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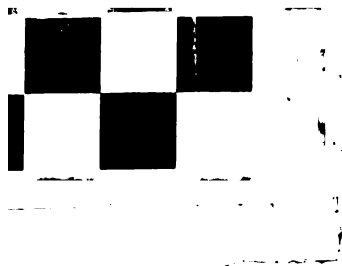
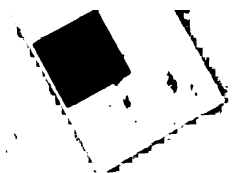
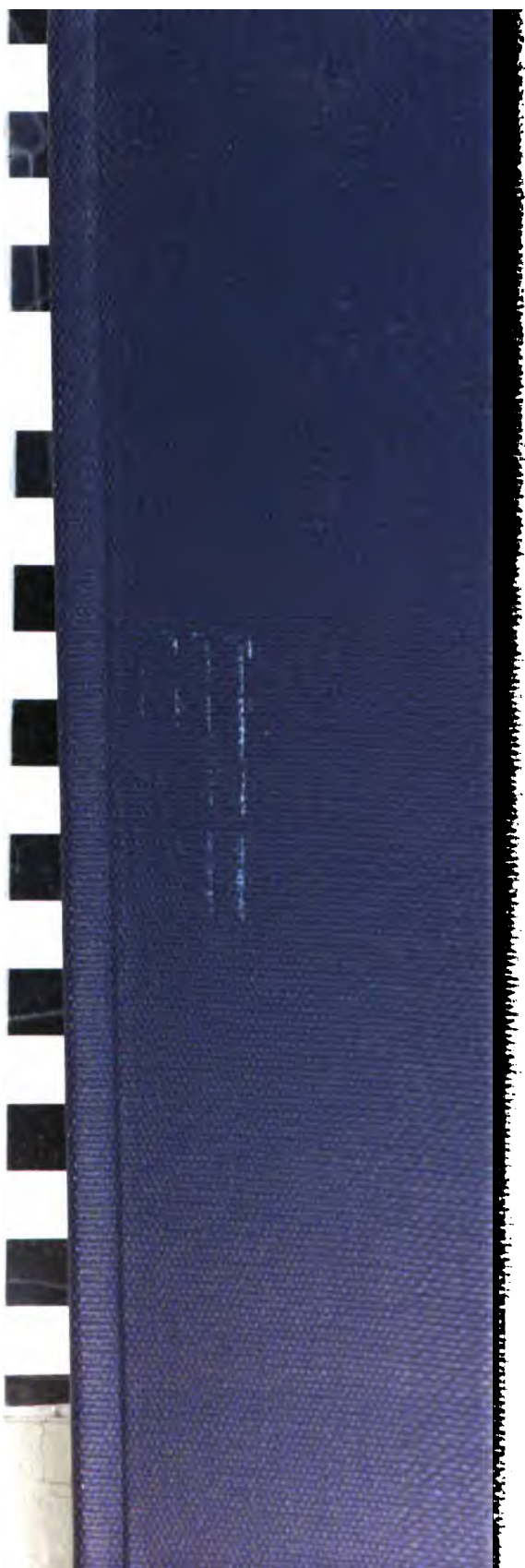
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the 1990s, the number of people in the world who are undernourished has increased from 600 million to 800 million.

There are a number of reasons for this. First, the world population has increased by 1.5 billion in the last 25 years. Second, the world population is ageing, and the elderly are more likely to be undernourished.

Third, the world population is becoming more urban, and urban populations are more likely to be undernourished. Fourth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Fifth, the world population is becoming more educated, and educated populations are more likely to be undernourished. Sixth, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.

Seventh, the world population is becoming more diverse, and diverse populations are more likely to be undernourished. Eighth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Ninth, the world population is becoming more educated, and educated populations are more likely to be undernourished. Tenth, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.

Eleventh, the world population is becoming more diverse, and diverse populations are more likely to be undernourished. Twelfth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Thirteenth, the world population is becoming more educated, and educated populations are more likely to be undernourished. Fourteenth, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.

Fifteenth, the world population is becoming more diverse, and diverse populations are more likely to be undernourished. Sixteenth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Seventeenth, the world population is becoming more educated, and educated populations are more likely to be undernourished. Eighteenth, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.

Nineteenth, the world population is becoming more diverse, and diverse populations are more likely to be undernourished. Twentieth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Twenty-first, the world population is becoming more educated, and educated populations are more likely to be undernourished. Twenty-second, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.

Twenty-third, the world population is becoming more diverse, and diverse populations are more likely to be undernourished. Twenty-fourth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Twenty-fifth, the world population is becoming more educated, and educated populations are more likely to be undernourished. Twenty-sixth, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.

Twenty-seventh, the world population is becoming more diverse, and diverse populations are more likely to be undernourished. Twenty-eighth, the world population is becoming more mobile, and mobile populations are more likely to be undernourished.

Twenty-ninth, the world population is becoming more educated, and educated populations are more likely to be undernourished. Thirtieth, the world population is becoming more affluent, and affluent populations are more likely to be undernourished.





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A TREATISE  
ON THE  
LAW OF HOMICIDE  
IN THE  
UNITED STATES:

TO WHICH IS APPENDED  
A SERIES OF LEADING CASES.

BY  
FRANCIS WHARTON, LL. D.,

AUTHOR OF "A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES," "A TREATISE ON NEGLIGENCE," "A TREATISE ON THE CONFLICT OF LAWS," "PRECEDENTS OF INDICTMENTS AND PLEAS," "STATE TRIALS OF THE UNITED STATES," ETC.

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## PREFACE.

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FOR some years after the exhaustion of the first edition of this work, I declined to revise it for republication. The topic, so far as concerns its general principles, was discussed in my Treatise on Criminal Law; and in the successive editions of that work the intermediate changes of the law in this respect are noted. The period, however, has now arrived, when, in view of the fact that the first edition of the Homicide is still frequently cited in the courts, its revision and correction are imperative. The importance of the interests at stake demands that the applicatory cases should be stated at large and critically scanned; the changes which the last few years have wrought in the juridical conception of the Law of Homicide are so fundamental, that it is proper not only that they should be correctly recapitulated but that they should be fully discussed. Of these changes the following are the chief:—

1. That which treats malice and intent as inferences of fact and not as presumptions of law;<sup>1</sup>
2. That which regards insanity as a condition susceptible of many degrees, so that a man may be sane enough to be penally responsible, and yet not sane enough to form a deliberate intent; and which would therefore exact in such a case a conviction of such a

<sup>1</sup> *Infra*, § 669.

## PREFACE.

grade of offence as does not imply malice or deliberate intent;<sup>1</sup>

3. That which holds that the defendant is to have the benefit of reasonable doubt not merely as to the fact of guilt, but as to all the conditions essential to a conviction;<sup>2</sup>

4. That which holds that to sustain an averment of an intent to kill the deceased, evidence of intent to kill a human being must be produced; rejecting herein the old doctrine that a collateral felonious intent can be tacked to unintended homicide, so that a man who in stealing a fowl accidentally kills the fowl's owner, can be held guilty of murder;<sup>3</sup>

5. That which brings out in full prominence, as the proper check on the modification last stated, the doctrine that negligence in the use of dangerous instruments is in itself a misdemeanor, and that consequently he who by the negligent use of a dangerous instrument kills another unintentionally, is guilty, not indeed of murder as the old law in certain cases assumed, but of manslaughter, which the old law sometimes overlooked;<sup>4</sup>

6. That which adopts as the test of "apparency of danger" in cases of self-defence, the perceptions, not of an ideal reasonable man, but of the defendant himself;<sup>5</sup>

7. That which holds that between the defendant's malice and the deceased's death there should be established a causal connection, consisting of the sequence of ordinary and well recognized physical laws.<sup>6</sup>

In the first edition of the present work the law in these

<sup>1</sup> *Infra*, § 584.

<sup>2</sup> *Infra*, § 649-660.

<sup>3</sup> *Infra*, § 80, 55.

<sup>4</sup> *Infra*, § 87.

<sup>5</sup> *Infra*, § 505.

<sup>6</sup> *Infra*, § 358.



#### PREFACE.

relations was given as it then stood. Since then a more intelligent psychology and a more humane conception of jurisprudence have not only vindicated the modifications I have just specified, but these modifications, with greater or less completeness, have been adopted by the courts. I feel, therefore, that the time has now come when these modifications, with the reason and authorities which sustain them, should be wrought into the text of a systematic treatise. I am not content to accept them in brief, with the small proportionate space that can be allotted to them, in the current editions of my Criminal Law. I am still less content that the first edition of my Homicide should continue to be cited as sustaining doctrines now obsolete. I have therefore undertaken with no little interest the preparation of the present volume, in which, indeed, only partial fragments of its predecessor can be found. Since 1855, when the prior edition was published, not only have the great changes which I have noted been in progress, but the number of decisions applicable to the entire topic has trebled. These decisions I have incorporated in the text; and I feel able to say that I have thus not only given, as far as my ability permitted, the philosophy of the law, but that I have presented on each point the rulings of the Courts of England and of the United States down to within a few days of the present date.

CAMBRIDGE, *May* 10, 1875.

## ERRATA.

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- Page 78, note 3, change "Byrne" to "Bryne."  
Page 102, note 3, line 5, change "Whitehead" to "Whitehorne."  
Page 156, note, 2d col., line 22, change "4 B. C. C." to "4 B. & C."  
Page 170, change "50 Alab.," in note 1, 3d line from bottom of page, to "40 Alab."  
Page 189, change "18 Mich.," in note 3, 2d line, to "8 Mich."  
Page 196, 2d column, 3d line from bottom of page, for "When arrests may be made" read "III. WHEN ARRESTS MAY BE MADE."  
Page 211, change "58 Penn. St.," in note 1, 2d line, to "38 Penn. St."  
Page 272, after "R. v. Mears," add "S. C. 8 C. & P. 616."  
Page 280, change "29 Missouri," in note 3, last line, to "27 Missouri."  
Page 293, note 1, change "1 Ill." to "11 Ill."  
Page 348, note 4, change "23 Alab." to "25 Alab."  
Page 551, change "8 Ired.," in note 1, 6th line, to "9 Ired."  
Page 632, note 1, 2d line from end, change "4 Houston" to "2 Houston."

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## **THE LAW OF HOMICIDE.**





# THE LAW OF HOMICIDE.

## CHAPTER I.

### GENERAL CLASSIFICATION.

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|--|--|
| <p>I. MURDER, § 2.<br/>Definition, § 2.</p> <p>II. MANSLAUGHTER, § 4.<br/>Voluntary manslaughter, § 5.<br/>Involuntary manslaughter, § 6.</p> <p>III. EXCUSABLE HOMICIDE, § 8.<br/>Definition, § 8.</p> <p>IV. JUSTIFIABLE HOMICIDE, § 9.<br/>Definition, § 9.<br/>Distinction between excusable and justifiable homicide now disregarded in practice, § 9.</p> <p>V. CERTAIN REQUISITES OF HOMICIDE IN GENERAL, § 11.</p> | <p>1. Deceased must be shown to have been living when the alleged blow was struck, § 11.</p> <p>2. The wound must be traced to the blow, § 12.</p> <p>3. The homicide must not have been in legitimate public war, § 13.</p> <p>4. There must be proof of the <i>corpus delicti</i>, § 14.</p> <p>5. The death must have been within a year and a day from the injury, § 15.</p> |
|--|--|

§ 1. HOMICIDE, at common law, is divided into the following heads:—

- I. Murder.
- II. Manslaughter.
- III. Excusable Homicide.
- IV. Justifiable Homicide.

#### I. MURDER.

§ 2. *Definition.*—Murder, as usually defined, is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the commonwealth, with malice prepense or aforethought, either express or implied.<sup>1</sup>

§ 3. So far, however, as this definition is distinctive it is inconclusive. Murder is distinguished from other kinds of killing

<sup>1</sup> 3 Inst. 47, 51; 2 Ld. Raymond, s. 8, 8; Kel. 127; Fost. 256; 4 Blac. 1487; 1 Hale, 425; 1 Hawk. ch. 31, Com. 198; Lewis C. L. 394.

by the condition of malice ; but malice is a term which requires, as will be seen in the next chapter, peculiar exposition and limitation. It may, however, be here incidentally remarked that the necessity of a further definition of the term malice is not obviated by the use, in the definition before us, of the words "unlawful" and "wicked"; for manslaughter may be "unlawful" and "wicked" without amounting to murder. Nor do the words "prepense" or "aforethought" relieve the definition from ambiguity. What is "prepense" or "aforethought"? Can the mental processes by which conclusions are reached be measured by the flow of time? Have not the courts agreed in holding that all acts exhibiting design are presumed to have been intended; and does not intention itself include prior thought? Under these circumstances we must hold that the definition just given, authoritative as it is, does not exhaustively describe the offence of murder. And we must reach, also, a second conclusion: if the sagacity of our jurists working on this important topic for so long a series of years has been unable to construct a terse, satisfactory definition of homicide, this is because such a definition cannot, from the nature of the thing to be defined, be constructed. In order, therefore, to understand what murder is, we must study the subject in the concrete. When each particular case is presented to the jury, terms can readily be found, in aid of the common law or statutory definition, to reach the merits of such case. But a definition which is large enough to cover all cases in advance must be necessarily so general that each of its leading terms requires a new definition to make it exact.<sup>1</sup>

<sup>1</sup> On this point, Bramwell, B., in his testimony before the Homicide Amendment Committee (London, 1874), speaks: "I think a judge who knows his business never troubles the jury with needless definitions, but he deals with the particular case before him, and says, for instance, in the case which I have put: 'The first question that you have to consider is' (forgive a sort of model summing up), 'did the man die of the injuries which he received? The doctors prove he did. The next question is, did the prisoner commit them? As to which the evi-

dence is so-and-so. Now you have to consider that if you are of opinion that he is at least guilty of having killed him, whether it is murder; and that depends upon the extent of the blows, and where they were directed to. If you think he intended to kill him, and did, it matters not what means he used; but suppose he did not intend it, you must consider whether the means used were likely to do it.' If you observe, in that case you lay down no definition; you assume that the jury and you both know what the law is; or you tell them what the law is in

## II. MANSLAUGHTER.

§ 4. *Definition.* — *Manslaughter* is the unlawful and felonious

that particular case. I frankly confess that if I had to give to the jury a definition, 'First of all, gentlemen, I have to tell you what homicide is, and then what criminal homicide is, and then what is not criminal homicide,' I expect the jury would be utterly bewildered. It is my duty as a judge to inform myself of the meaning of the act, and not to trouble the jury with a definition except so far as necessary."

Mr. Livingston, in his Report on the Louisiana Penal Code, says: "Coke's description of the crime is the one most generally sanctioned by decisions and commentators. It is this: 'When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.'"<sup>1</sup> Now suppose a jury empanelled to try an indictment for murder, and after the circumstances of the case have been detailed by the evidence, this description is read to them, and they are directed by the court under the sanction of their oaths to apply it to the case. There is scarcely a word in it that, to a conscientious man, will not afford matter for serious doubt. The perpetrator must have been of *sound memory* and *understanding*. What a scope does this give for equivocation! What a field does it open for inquiry! What has the soundness of memory to do with the act? Be the faculty ever so imperfect, how does it affect the guilt? And as to discretion, if a sound discretion were necessary to constitute guilt, no one could be guilty; for surely he commits the highest in-

discretion who takes the life of another, and exposes his own to consequences of detection and punishment. The killing must be also *unlawful*. Here we have one of the features of the description contained in the Code, but without the faculty which it affords of determining, by a reference to a few preceding pages, whether the killing be lawful. The person killed, to constitute the crime, must be a *reasonable* creature. Neither a new-born infant, nor an idiot, nor a madman, nor one suffering in the delirium of a fever, or stupefied by opium or liquor, comes within this part of this description according to the plain meaning of the words.

"Again, who is in the *king's peace*? What is *malice aforethought*? Is there any malice that is afterthought? What is *express malice*? When shall it be *implied*? Thus we find that there is scarcely a word in the description of a crime so important to be known, that will not raise at least a doubt in the mind of a man of common understanding; and it would be difficult, perhaps, to prove any description of the crime, which would sufficiently give us to understand its precise meaning, without a reference to the definitions of those homicides which were not included in it. I am certainly aware that most of these terms have been expounded by commentators and illustrated by decisions, and that a recourse to these sources of information would teach us what construction the best lawyers and judges have put upon them; but still the evil recurs. There is no source to which we can look for the absolute certainty on which the conscience of a

<sup>1</sup> 3 Inst. 87.

killing of another, without any malice, either express or implied.<sup>1</sup> Manslaughter differs from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionably lenient.<sup>2</sup>

It is no defence to an indictment for manslaughter, that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was, therefore, murder; but the defendant in such case may, notwithstanding, be properly convicted of the offence of manslaughter.<sup>3</sup>

§ 5. *Voluntary manslaughter.* — Manslaughter at common law is of two kinds: 1st. Voluntary manslaughter, which is the unlawful killing of another, without malice, on sudden quarrel or in heat of passion. Where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they, upon such occasion, go out and fight in a field; for this is one continued act of passion. So also if a man be greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendendo*. In these and such like cases, the law, kindly appreciating the infirmities of human nature, extenuates the offence committed, and mercifully hesitates to put on the same footing of guilt, the cool deliberate act and the result of hasty passion.<sup>4</sup>

juror ought to rest, who is sworn to decide, and the definition given to him as the text of the law; he has a right to put the construction which his understanding adopts upon the doubtful words; and there are cases, too, in which the expositors to whom he is directed are not themselves agreed, more particularly in what respects the construction of malice, express or implied, — the great pivot on which this definition turns, — and one of which it is so difficult to form a definite idea, that I have purposely excluded it from the description of this offence in the Code.”

<sup>1</sup> 1 Hale, 449; 1 Hawk. c. 30, s. 2.

<sup>2</sup> Ex parte Tayloe, 5 Cowen, 51; King v. Com. 2 Va. Cases, 78; Com. v. Bob, 4 Dall. 125; State v. Tookey, 2 Rice S. C. Dig. 104; Penn. v. Levin, Addison, 279; State v. Travers, 2 Wheeler's C. C. 506; Com. v. Mitchell, 1 Va. Cases, 716; Parker, J., Selfridge's Trial, 158; 1 Hale, 449, 450, 466; 3 Inst. 55; 1 Hawk. c. 30, s. 2; vide R. v. Mawgridge, Kel. 124; Fost. 290. Vide Lord Cornwallis's case, Dom. Proc. 1678; 2 St. Tr. 730.

<sup>3</sup> Com. v. McPike, 3 Cush. 181.

<sup>4</sup> 1 Hale, 449; 1 Bl. Comm. 191; 1 Hawk. c. 30, s. 3; Com. v. Drum, 58

§ 6. *Involuntary manslaughter*, according to the old writers, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed. Hence it is manslaughter where the death of another occurs through the defendant's negligent use of dangerous agencies;<sup>1</sup> and so where death incidentally but unintentionally results in the execution of a trespass.<sup>2</sup>

§ 7. It is proper, however, to observe that the distinction between voluntary and involuntary manslaughter is now, so far as concerns the common law, obsolete. Unless it should be required by statute, the terms "voluntary" and "involuntary" are not now introduced either in indictment, verdict, or sentence. In each of the cases just specified the offence is simply charged as "manslaughter;" and "manslaughter" is the term used by the jury in case of conviction.

### III. EXCUSABLE HOMICIDE.

§ 8. *Definition.* — *Excusable homicide* is of two kinds: 1st. Where a man doing a *lawful act*, without any intention of hurt, by accident kills another; as, for instance, where a man is hunting in a park, and unintentionally kills a person concealed. This is called homicide *per infortuniam*, or by misadventure. 2d. *Se defendendo*, or in self-defence, which exists where one is suddenly assaulted, and in the defence of his person, where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. To reduce homicide in self-defence to this degree, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the

Penn. 9; State v. Smith, 10 Rich. Law (S. C.), 341; Stokes v. State, 18 Geo. 17; Perry v. State, 43 Alab. 21; Murphy v. State, 31 Ind. 511; Tayloe, ex parte, 5 Cowen, 51; King v. Com. 2 Va. Ca. 78.

<sup>1</sup> R. v. Murray, 5 Cox C. C. 509; R. v. Chamberlain, 10 Cox C. C. 486; R. v. Rigmardon, 1 Lewin, 180; R. v. Timmins, 7 C. & P. 499; R. v. Dallo-

way, 2 Cox C. C. 273; R. v. Swindall, 2 C. & K. 229; R. v. Pargeter, 3 Cox C. C. 191; R. v. Lowe, 4 Cox C. C. 449; R. v. Smith, 11 Cox C. C. 210; State v. O'Brien, 3 Vroom, 169. Infra, § 87.

<sup>2</sup> 1 Hale, 449; Fost. 270; State v. Turner, Wright, 20; State v. Smith, 32 Me. 369; State v. Center, 35 Vt. 378; R. v. Archer, 1 F. & F. 351.

honest intent to avoid the violence of the assault. The jury, as will presently be seen more fully, must also be satisfied that, at the time he killed the assailant, he honestly believed himself in imminent and manifest danger either of losing his own life or of suffering enormous bodily harm.<sup>1</sup> By the older text writers, this species of homicide is sometimes called chance medley or *chaud medley*, words of nearly the same import. As will in another chapter be explained more fully, the same right of self-defence is extended to the relations of master and servant, parent and child, and husband and wife; and to those cases where homicide is unavoidably committed in the defence of the possession of one's dwelling-house against a trespasser, who, having entered, cannot be put out otherwise than by force; and where no more force is used and no other instrument or mode is employed than is necessary and proper for that purpose. Under the same general head of excusable homicide may also be enumerated that class of cases where two persons are reduced to the alternative, that one or the other or both must perish; as where two shipwrecked persons are on one plank which will not hold them both, and one thrust the other from it, so that he is drowned, the survivor is excused.<sup>2</sup>

#### IV. JUSTIFIABLE HOMICIDE.

§ 9. *Definition.* — *Justifiable homicide*<sup>3</sup> is that which is committed, either, 1st: By unavoidable necessity, without any will, intention, or desire, or any inadvertence or negligence in the party killing, and, therefore, without blame; such as by an officer executing a criminal, pursuant to the death warrant, and in strict

<sup>1</sup> 4 Bl. Comm. 182; 1 Russ. on Crimes, 660, 661; Whart. Am. Crim. Law, § 935.

<sup>2</sup> *Infra*, § 558.

<sup>3</sup> 8 Green. on Evid. 115; 4 Bl. Comm. 178-180; 1 Russ. on Crimes, 665, 670. The Roman law recognized the same principles: Qui latronem occiderit, non tenetur, utique si aliter periculum effugere non potest. Inst. lib. 4, tit. 3, § 2. Furem nocturnum, si quis occiderit, ita deum impune feret, si parcere ei sine periculo suo non potuit. L. 9. D. 48,

8. Qui stuprum sibi vel suis per vim inferentem occidit, dimittendum. L. 1, § 4. D. 48, 8. Si quis percussorem ad se venientem gladio repulerit, non ut homicida tenetur; quia defensor propriæ salutis in nullo pecasse videtur. Cod. lib. 9, tit. 16, l. 3. In the cases mentioned in the text, if the homicide is committed with undue precipitancy, or the unjustifiable use of a deadly weapon, the slayer will be culpable. See Alison's Crim. Law of Scotland, p. 100; *Ibid.* p. 132-139.

conformity to the law in every particular; or, 2dly: For the advancement of public justice; as where an officer, in the due execution of his office, kills a person who assaults and resists him; or where a private person or officer attempts to arrest a man charged with felony and is resisted, and in the endeavor to take him, kills him; or if a felon flee from justice, and in the pursuit he be killed, where he cannot otherwise be taken; or if there be a riot, or a rebellious assembly, and the officers or their assistants, in dispersing the mob, kill some of them, where the riot cannot be otherwise suppressed; or if prisoners, in jail or going to jail, assault or resist the officers, while in the necessary discharge of their duty, and the officers or their aids, in repelling force by force, kill the party resisting; or, 3dly: For the prevention of any atrocious crime, attempted to be committed by force; such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any other act of felony against the person.<sup>1</sup> But in such cases the attempt must be not merely suspected, but apparent, and the danger must be imminent, and the opposing force or resistance necessary to avert the danger or defeat the attempt.<sup>2</sup>

§ 10. *Distinction between excusable and justifiable homicide now disregarded in practice.* — The distinction, in result, between justifiable and excusable homicide is now practically exploded. In former times, in the latter case, as the law presumed that the slayer was not wholly free from blame, he was punished, at least by forfeiture of goods. But in this country such a rule is not known ever to have been recognized; it having been the uniform practice here, as it now is in England, where the grade does not reach manslaughter, for the jury under the direction of the court to acquit.<sup>3</sup>

#### V. CERTAIN REQUISITES OF HOMICIDE IN GENERAL.

§ 11. 1. *It must be shown that the deceased was living when the alleged mortal blow was struck.* — It is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck. Thus, where it was doubtful, in a case

<sup>1</sup> United States v. Wiltberger, 3 Washburn, 515; and see State v. Rutherford, 1 Hawks, 78, 457; State v. Roane, 2 Dev. 58. <sup>2</sup> 4 Bl. Comm. 182; 1 Russ. on Crimes, 657-660. <sup>3</sup> See infra, § 902.

where a mother was charged with throwing her child overboard, whether it was living or dead at the time, it was held that it rested on the government to show it was living at the time, it appearing that the mother was laboring under puerperal fever, and the idea of malice being thereby excluded.<sup>1</sup> The presumption that a person proved to have been alive at a particular time is still so, holds until it is rebutted by the lapse of time, or other satisfactory proof.<sup>2</sup> Hence it follows that in cases of infanticide it must be shown that the child was born alive.<sup>3</sup>

§ 12. 2. *The wound must be traced to the blow.* — This topic is reserved for discussion in a future chapter.<sup>4</sup>

§ 13. 3. *The homicide must not have been in legitimate public war.* — The words, "in the peace of God and the said commonwealth, then and there being," as used in the indictment, and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war;<sup>5</sup> at the same time, it must be remembered that killing even an alien enemy, unless such killing occur in the actual exercise of war, would be murder.<sup>6</sup>

The plea of an Indian war with the United States cannot avail as an excuse for murder committed by "friendly" Indians, of "Indians at war," and in a part of the country not involved in hostilities.<sup>7</sup>

But homicide by any person forming part of a belligerent army, recognized as such, is not murder when committed in due course of war.<sup>8</sup>

§ 14. 4. *There must be proof of corpus delicti.* — The *corpus delicti*, in all cases of homicide, must be proved as an essential condition of conviction. To the *corpus delicti*, as will be hereafter more fully seen, it is requisite, 1st, that the defendant should be shown to have died from the effect of a wound; 2dly,

<sup>1</sup> U. S. v. Hewson, 7 Boston Law Reporter, 361, per Story, J.

<sup>2</sup> Com. v. Harman, 4 Barr, 269; Wh. Cr. L. § 2634.

<sup>3</sup> See this expanded in Whart. Cr. Law, 7th ed. § 942.

<sup>4</sup> *Infra*, § 358.

<sup>5</sup> Whart. Conf. of Laws, § 911; Wh. Cr. L. 7th ed. 210 q<sup>1</sup>; 3 Inst. 50; 1 Hale, 433.

<sup>6</sup> 1 Hale, 433; 3 Inst. 50; State v. Gut, 13 Minn. 341.

<sup>7</sup> Jim v. Territory, 1 Wash. Ter. 76; and see proceedings in the Modocs' case, June, 1873.

<sup>8</sup> Smith v. Brazelton, 1 Heiskill, 44; Gunter v. Patton, 2 Heiskill, 261; Sequestration cases, 30 Texas, 700; and other cases cited in an interesting review of this topic in Southern Law Rev. Ap. 1873, 337



that it should appear that this wound was unlawfully inflicted. The evidence on these points will be examined hereafter.<sup>1</sup>

§ 15. 5. *The death must have been within a year and a day from the injury.* — By the English common law the death must have occurred within a year and a day from the date of the injury received;<sup>2</sup> and hence, an indictment which does not aver the death to have occurred within this limit is fatally defective.<sup>3</sup>

<sup>1</sup> *Infra*, § 628.

<sup>2</sup> 3 Inst. 53; *infra*, § 845.

<sup>3</sup> *State v. Orrell*, 1 Dev. 139; *People v. Aro*, 6 Cal. 207; *People v. Kelley*, 6 Cal. 210. Mr. Fitzjames Stephen, in his testimony before the English Homicide Amendment Committee (1874), thus speaks on this point: —

“First, with regard to the rule about death happening within a year and a day of the act. That rule you will find laid down, together with the reasons for it, in Coke’s 3d Institute, folio 53, and it is in substance a rule of evidence; and it seems to me a very rough kind of rule of evidence, adapted to an age when there was very little medical knowledge. Coke says: ‘If he die after that time it cannot be discerned, as the law presumes, whether he died of the stroke or poison, &c., or of a natural death; and in case of life, the rule of law ought to be certain.’ I never happened to hear or read of a case in

which the question about the year and a day rule arose; but I should think in the present day it would seem very strange that you should be able to say that a man died of a wound eleven months after it was received, but that at thirteen months it became perfectly impossible to say whether he did or not. It seems to me a rule of evidence, and that the prisoner under all circumstances would get the benefit of the doubt which would arise if death were delayed for any considerable time.” Blackburn, J., in his testimony before the same committee, said: “It has been laid down, and I fancy is law still, that unless death ensues within a year and a day, you must take it as a presumption that cannot be rebutted that the death was not caused by violence; but I never heard of any one being accused of murder or manslaughter when the deceased had lived anything like a year afterwards, so that I do not think it is of practical consequence.”

## CHAPTER II.

### ELEMENTARY PRINCIPLES AS TO MALICE.

Definition of Malice and <i>Dolus</i> , § 18.	Malice an evil design, either general or special, § 29.
Expositions of Italian Jurists: Decian, § 19.	May be inferentially proved, § 30.
Early German Jurists: Carpzov, § 20; Leyser, § 21; Nettleblatt, § 22.	When existing presumed to continue, § 31.
Recent German Jurists: Gessler, § 23.	Duration of intent, § 32.
Sufficient if an assailant contemplated contingency of fatal result, § 25.	Intent at time of killing enough, § 33.
Classification of <i>Dolus</i> , § 26.	Malice does not require physical contact at time of killing, § 34.
Views of English common law writers, § 29.	Doubt as to malice, § 35.

§ 18. *Definition of malice and dolus.* — Malice may be defined as evil intent; and may, for the purposes of this treatise, be regarded as convertible with *dolus*. *Dolus*, indeed, includes the idea of fraud, which in our present legal use is not expressed by malice; but so far as concerns injuries effected by force, *dolus* expresses whatever we are accustomed to include under the term malice. A wound, which by our law would not be regarded as malicious, would not by the Roman law be regarded as caused by *dolus*. A wound to whose author the Roman law does not impute *dolus*, would not be regarded by our law as malicious. Between *dolus* and *culpa* the line is drawn in the Roman law in the same way as in our own law, the line between malice and negligence. There is, however, this difference between the two jurisprudences: to *dolus*, as a psychological study, the Roman jurists devoted great attention; to malice, as a psychological study, our jurists have given but little attention, contenting themselves with dealing curtly with the subject in the concrete. Under these circumstances, it may elucidate our conclusions if we examine some of the expositions of Roman jurisprudence on this interesting topic.

§ 19. *Expositions of the Italian Jurists: Decian.* — Beginning with the Italian jurists, the first expositor whom we may notice is Decian, a commentator who wrote early in the sixteenth

century,<sup>1</sup> and who took a prominent part in the jurisprudence and politics of Italy. He starts by distinguishing between *mens*, *voluntas*, and *intentio*, declaring the latter to be an act of the will directed to a specific end, while under *propositum* he includes the selection of means to effect such end. He considers that *dolus*, in this sense, may be viewed in seven distinct aspects:—

1. When the intention exists only in thought; in which case no liability attaches: *cogitationis poenam nemo patitur*.

2. When the actor proceeds to an attempt without effecting the object in view; when, if the attempt is part execution of the intended crime, a penal offence is committed.

3. When he effects his object by the means which he designs, which is *dolus*.

4. When from the means he designs, an object aside from his original purpose is effected; in which case no *dolus* is necessarily imputed.

5. When an accident intervenes, to which *dolus* succeeds.

6. When the effect is produced by *culpa*.

7. When the effect is produced without either *dolus* or *culpa*.

*Dolus* is described as *voluntatis vitium*, or an error of the will; *culpa* as *intellectus et memoriae vitium*, or error of the intellect and memory. *Dolus* is ascribed to *menti sceleratae et flagitiosae*; *culpa*, to *menti imprudenti ac stolidae*. Offences marked by *dolus* are described as *vera maleficia*; those marked by *culpa*, as *quasi maleficia*. According to Decian, therefore, an unintentional killing, even though in performance of an illegal act, could not be charged to *dolus*. Hence to convict for a malicious homicide there must be a specific intent to kill. For *dolus* is defined to be *animi destinatio et propositum ad certum delictum quoquo modo perpetrandum*; in other words, the malice, to sustain the charge of a malicious crime, must have been directed to this particular crime.

§ 20. *Early German Jurists*. — Carpzov (1595–1666) was a leading Saxon jurist, being at the same time a judge, a professor of jurisprudence in the University of Leipsic, and a privy councillor to the King of Saxony. The question that is again beginning to agitate Anglo-American courts, whether when a death accidentally and unintentionally follows from a wound, the inten-

<sup>1</sup> *Tractatus Criminalis*, lib. I. c. 4, 6 *et seq.*

tion of which was only to hurt, the crime is murder, was disposed of by Carpzov very much in the same way that it is disposed of by our own courts. If the means adopted by the actor were likely to cause death, then the homicide is to be treated as malicious. The assailant who, when inflicting a wound, knows, or ought to know, that the wound may perhaps produce death (*vulnera ad mensuram dari non posse*), premeditates the wound with all the consequences it contingently involves, and therefore premeditates the consequence of death. It is true that the will applies in such case to the death only *indirecte et per accidens*; in the same way that he who wills to drink wine immoderately indirectly wills to be drunk. Hence, according to the reasoning of Carpzov, when death, though not specifically intended, results from an intentional wound, then the homicide is to be viewed as indirectly intended. No opinion, however, is expressed on the question whether *dolus* is to be imputed in cases where the death follows the wounding not *per se*, but *per accidens*.

§ 21. *Leyser* (1683–1752), a professor in Wittenberg, and author of a valuable exposition of the Pandects,<sup>1</sup> spent some years of study in England, and discussed the question of *dolus* no doubt with a full knowledge of the old English doctrine of the tacking of collateral felonious intent.<sup>2</sup> He advances on the propositions of Carpzov, by holding that to *dolus generalis* it is not essential that there should be *propositum vulnerandi aut corpus laedendi*, but that it is enough if there be *animus quomodocunque laedendi*.

§ 22. To *Nettlebladt* (1719–1791), a professor at Halle, we are indebted for a *Dissertatio juridica de homicidio ex intentione indirecta commisso*, in which the immediate topic before us is minutely discussed.<sup>3</sup> According to the view here propounded, guilt (*Schuld*), in its general relations, is a *defectus rectitudinis actionis (convenientiae cum omnibus determinationibus hominis essentialibus) vincibilis*. *Culpa, in specie*, is a *defectus rectitudinis actionis quoad intellectum vincibilis*; while *dolus* is a *def. rect. actionis quoad voluntatem vincibilis*. *Culpa* assumes inaction both as to knowing and willing; *dolus* assumes that the act is

<sup>1</sup> *Meditationes ad Pandectas*, xi. vol., Leipzig, 1741.

<sup>2</sup> See *infra*, § 55.

<sup>3</sup> I quote in this, as in prior in-

stances, from the copious abstract in Gessler's *Dolus*, Tübingen, 1860, not having access to the original text.

done both knowingly and willingly. In other words, negligence is a defect of the intellect ; malice, a defect of the heart. Negligence is lack of attention ; malice, an evil intention. Here, then, we strike upon the important distinction between direct and indirect malice (*dolus directus* and *dolus indirectus*), which in substance, though not in terms, is now agitating both in England and in America those concerned in shaping criminal law.<sup>1</sup>

*Dolus directus*, according to the author immediately before us, is when the result is specifically intended ; as when A. kills B., intending at the time to kill. *Dolus indirectus* exists when the result is not specifically intended, but when it results as naturally from the means adopted by him as would have resulted that specifically willed ; as when A. wounds B., intending only to wound him, but when death naturally follows the wound. Anticipating the distinction of the Pennsylvania and other American statutes, a lighter punishment is to be assigned to *dolus indirectus*, where there is no specific intention to take life, than to *dolus directus*, where there is a specific intention to take life. To *dolus indirectus*, the following conditions are requisite : —

1. The result should follow from a voluntary act or omission of the assailant.

2. There must be an intention to hurt the individual killed, excluding, therefore, the cases where the intent is to commit a collateral felony.<sup>2</sup>

3. On the other hand, a direct purpose to kill must not exist, for then we would have *dolus directus* ; yet such direct purpose is only to be inferred when to the means of violence, as they are knowingly and wilfully adopted by the assailant, death is to be imputed as an unavoidable consequent.

4. There must exist a possibility that death should follow from the violent act of the assailant in the same way that there existed a possibility that the effect immediately designed would have followed from the same violence. This happens when the assailant uses a weapon, which ordinarily produces death, in such a way that from its use death or wounding is equally probable.

§ 23. *Recent German Jurists : Gessler.* — By recent German jurists the topic before us has been largely discussed. To enter

<sup>1</sup> See particularly testimony before the House of Commons' Homicide Committee, given *infra*, § 56.

<sup>2</sup> See *infra*, § 55.

upon the conflicting theories which have been advanced in this relation is out of my power ; and it is the less important to do so, since as to the main points which arise in our Anglo-American jurisprudence, the most reliable expositors unite. As representing these, I must content myself with referring to Gessler, whose judicious work on *dolus* was published, as has been noticed, in 1860. Gessler starts with the position that to *dolus* are essential, —

1. The internal will.
2. The external act.
3. The causal relation of the will to the act.

If the will is not brought into connection with the act, the act is not to be considered as willed ; yet we must remember that no thoughtful man can insulate a particular act so as to cut that act off from the consequences that naturally follow from it. I throw a stone into the water, intending simply to get rid of the stone from the land. Yet at the same time I cannot, as one who has previously observed similar results, and who reasons from the most familiar principles of physics, forget that this stone will cause a ripple on the surface of the water. Yet, on the other hand, A. shoots at B., intending to kill him, but the ball glances and kills C. The intention to kill B., could it be so insulated as to detach it from any consequence except that intended, could not support an indictment for killing C. ; but if it cannot be so insulated, and if shooting at B. necessarily involves the contingency of missing B. and hitting C., then *dolus* is to be imputed to the killing C. This brings up the famous distinction between *Vorsatz* and *Absicht*, — a distinction which cannot be tersely expressed in our own language. *Vorsatz* is the purpose to use a particular instrument ; *Absicht* is the purpose to effect a particular end. *Vorsatz*, for instance, selects the instrument of killing, knowing that its use may kill C. as well as B. ; *Absicht* selects B. as the person to be killed, indifferent as to what means are to effect the end. Yet, nevertheless, *Vorsatz* (the willing of the means) and *Absicht* (the willing of the end) stand in necessary relationship to each other. On the one side, the means used are employed to effect a particular end. On the other side, the end cannot be effected without the use of particular means. The means employed, however, may result in a variety of ends. Poison put in a well to kill a particular person may sicken, if not

kill, a whole family. The converse, also, is true, that the same final intent (*e. g.* an intent to kill) may be consummated by various instrumental intents; as a man intending to kill may poison, or shoot, or strangle. Hence it follows that to a crime there can be no final intent (*Absicht*) without an instrumental intent (*Vorsatz*), and no instrumental intent without a final intent. It is true that until there be an overt act, there can be an instrumental intent without a final intent, or a final intent without an instrumental intent. In other words, before the will is realized in act, there may be a vague intention to kill without any particular instrument, or there may be a vague idea of using a particular instrument without any purpose to kill. But the moment action begins, then there must be both instrumental intent and final intent. There must be instrumental intent, because action involves a specific instrument. There must be final intent, because no reasoning being uses means without an end.

§ 24. Applying these principles to criminal jurisprudence, we must remember that an instrumental intent, the realization of which produces an injury to another, may be either indifferent or criminal. A man may drop a stone from a roof on a street, and may do this either sportively or with intent to hurt a passer-by. When there is an intent to hurt, in other words, when to the intent to use a particular instrument the intent to hurt by the use of such instrument is added, then *dolus* exists. *Dolus* is therefore the consummation of an offence by an instrument specifically intended. *Culpa* consists in the consummation of an offence not intentionally, but through the lack of such diligence as it was the duty of the party to bestow.

§ 25. *Sufficient if assailant contemplated the fatal result as a contingency.* — It is here that emerges the question that has been productive of so much difficulty in this branch of jurisprudence. Is it sufficient to constitute *dolus* (malice) that the fatal result should only appear to the assailant as a mere possibility? In answering this question we must remember that we are not able to select arbitrarily the instruments we want to effect a particular end, nor is there any instrument which we can speak of as absolutely in our power. Even in respect to the agencies which seem most exclusively under our control (*e. g.* words in speaking), we must sometimes invoke the aid of independent conditions; and to execute a criminal intent upon another person peculiarly

requires a combination of uncertain factors. We have remarkable instances of this (to appeal to English history for an illustration of Gessler's argument) in the Thistlewood Conspiracy, as narrated in Lord Sidmouth's life, and in the Jacobite plots against William III. as narrated by Macaulay. Over and over again the projects had in each case to be recast, a new scheme being required by each change of attitude on the part of the parties to be attacked. In either case, as it ultimately turned out, the enterprise was liable to be frustrated by the interposition of an event which was in the ordinary range of probability. If, therefore, certainty cannot be predicated of any future event dependent upon the action of others, so an assailant, in meditating an attack on another, contemplates the possibility of miscarriage. This possibility may be greater or less. A good marksman may be almost sure of hitting his intended victim ; a man who sends an explosive compound to an enemy may calculate that the chances of injuring the enemy are slight. If the means adopted are such as cannot possibly succeed, then there is no such connection between the instrumental intent and the final intent as is essential to constitute guilt. But if there be no such impossibility, and if the means adopted, improbable as it would seem, have a fatal result, then the end is to be regarded as having been intended.

§ 26. *Gessler's classification of dolus.*—From the relations of instrumental intent to final intent (*Vorsatz* to *Absicht*), it follows that the first must be directed to the use of a particular instrument, but that this instrument may be used to effectuate one of several final intents ; *e. g.* a blow may be given with intent either to wound, or maim, or disgrace, or kill ; or a house may be set on fire with the alternative intent either to destroy the owner's property, or to take his life. In this view *dolus* may be regarded as either *determinatus*, *alternativus*, or *eventualis*.

§ 27. 1. *Dolus determinatus* exists when the instrument is intentionally used to effect a single purpose, as when a deadly poison is intentionally given when the sole purpose is to kill. It makes no difference whether or no the instrument will effect the object with apparent certainty. The person whose life is attempted may have warded off susceptibility to disease by antidotes. Or it may happen that the assailant may be limited in carrying out



his plan to a single agency comparatively uncertain. In either way *dolus determinatus* is established.

§ 28. 2. *Dolus alternativus or eventualis*.—It may happen that the instrument selected may have two or more distinct effects, and that of the possibility of this the assailant is or ought to be aware. This may occur in the following cases:—

- a. The assailant has a primary object in view, and his final intention is directed to effect this object; but he recognizes a second object as either the possible or probable result of the instrument he employs. Cases of this class are divided as follows:—
  - a<sup>1</sup>. *Dolus eventualis*.—When only the second object is criminal, as where A. shoots at a mark, seeing B. near the mark, and knowing that a slight divergence may cause the shot to miss the mark and to strike B.; and when B. is struck and killed.
  - b<sup>1</sup>. *Dolus determinatus et eventualis*.—When both objects are criminal; as where A. shoots at B. and hits C., who is so near to B. that the hitting of C. was or ought to have been within the contemplation of A. as probable.<sup>1</sup>
- b. When it is indifferent to the assailant which of several probable objects is effected by the instrument chosen by him.
  - a<sup>1</sup>. When only one of these objects is criminal, which is *dolus alternativus* in its single sense.
  - b<sup>1</sup>. When all are criminal, as where a man shoots at a crowd, not caring whom he hits; which is *dolus alternativus* in the ordinary sense.
- c. When the assailant desires to effect several criminal objects simultaneously, which takes place. This brings a concurrence of several *doli determinati*, which are to be tried severally.
- d. The assailant has his intention fixed on a single criminal object, but while effecting such object he accidentally and against his will effects, by the instrument used, another criminal object. If so, the first contingency involves only *dolus*; the second only *culpa*. This covers the case hereafter fully discussed, of a person who, when shooting a

<sup>1</sup> See *infra*, § 42, 48.

tame fowl, accidentally, and against his will, kills the owner of the fowl.<sup>1</sup>

§ 29. *Views of English common law writers.* — By the leading English writers of the old school, malice is held to include not only special malevolence to the individual slain, but a generally wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent on mischief.<sup>2</sup> And, in general,<sup>3</sup> any formed

<sup>1</sup> *Infra*, § 55.

<sup>2</sup> *Fost.* 256, 262. Malice is where a person "wilfully does that which he knows will injure another in person or property." *Blackburn, J. in R. v. Ward*, *Law Rep.* 1 C. C. 360; *Holland v. State*, 12 Florida, 117. It should not be forgotten in this connection, that the legal meaning of the term *malitia*, or malice, is different from its popular meaning, which makes it synonymous with spite. Thus Lord Holt says: "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancor of mind lodged in the person killing for some considerable time before the commission of the fact; which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice* are three distinct passions of the mind."<sup>1</sup> In Roman law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it<sup>2</sup> as "*versuta et fallax nocendi ratio*;" and in another work<sup>3</sup> he says: "*Mihi quidem etiam veræ hæreditates non honestæ videntur si sint malitiosæ* (i. e. according to Pearce, a malo animo profectis) *blanditiis officiorum; non veritate sed simulatione quaesitæ.*" And in the

*Pandects*,<sup>4</sup> in speaking of a banker or cashier giving his accounts, it is said: "*Ubi exigitur argentarius rationes edere, tunc punitur cum dolo malo non exhibet . . . Dolo malo autem non edidit, et qui malitiosæ edidit, et qui in totum non edidit.*" At common law, malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says: "If one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause."<sup>5</sup> And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus, where the 25 Hen. 8, c. 3, says, that persons arraigned of petit treason, &c., standing "mute of malice or froward mind," or challenging, &c., shall be excluded from clergy, — the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or

<sup>1</sup> 1 Hawk. P. C. c. 31, § 18; *Fost.* 257; 1 Hale, 451 to 454; 1 Russell on Crimes, 510-520.

<sup>1</sup> Kel. 127.

<sup>2</sup> *De Nat. Deor. lib.* 3, § 30.

<sup>3</sup> *De Offic. lib.* 3, § 18.

<sup>4</sup> *Dig. lib.* 2, tit. 13, Lex. 8.

<sup>5</sup> 2 *Inst.* 384.

design of doing mischief is by these authors called malice ; and, therefore, not such killing only as proceeds from premeditated

some other disability or distemper. And in the statute 21 Edw. 1, *De malefactoribus in parvis*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but "*immo malitiam suam proseguendo et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters) whether the act were done with or without just cause or excuse ; so that it has been suggested that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*.

"If you had to look for a definition of murder," says Bramwell, J., in his evidence before the English Homicide Committee, "you would not find it anywhere precisely laid down ; you would have to search through Coke's Institutes, Hale's Pleas of the Crown, Hawkins's Pleas of the Crown, Leach's Crown Law, and Russell on Crimes, and a score of other books. You would not find it intelligibly or authoritatively stated anywhere to comprehend all cases ; and in addition to that, when you did find it, you would find it encumbered with what I cannot help calling a number of unfortunate expressions about malice, and malice aforethought, and other things which are attended with several mischiefs. I do not suppose that anybody is nowadays hanged who ought not to be hanged, on account of the want of a precise definition of murder, or that many get off on account of it ; but undoubtedly it is a bad thing that you cannot point to an authoritative

definition of murder. And another very mischievous thing is this, that when one is trying a case the counsel for the prisoner (who thinks all things fair when a man's life is at stake) will protest that the indictment charges him with malice aforethought, that that involves premeditation and ill-will, and things of that description : but here was a sudden quarrel and an outbreak, and although the man was stabbed to the heart, or shot through the brain, yet they ought not to find that was murder in the sense that the man is charged with it. Of course, when it comes to the turn of the judge, he does his best to set that right ; but it is very objectionable, in two points of view. In the first place, you never can tell how that impression may get hold of the minds of the jury, and how difficult it is to remove it. If you sit still, and let the counsel go on, an impression is made on the jury ; and if you interrupt him, there is an outcry and a grievance ; and then it is attended with this mischievous consequence, that the judge seems to be taking a view unfavorable to the prisoner, which always gives the jury an inclination to take the opposite view out of a sense of justice. Now, if the definitions of murder were as they are in this bill, and the indictments were framed as it is suggested they could be here, a mischief of that sort never could arise. So that I think that the object of the bill is good in the alterations it makes in the law ; and I think its object is good in the alterations it makes in definitions, which, I believe, to a very considerable extent, substantially leave the law as it is, but lay it down in a precise and intelligible form, open to no controversy and discussion."

hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder.<sup>1</sup>

§ 30. *Malice to be inferentially proved.*—When one person kills another with a sedate, deliberate mind and formed design, malice is said to be *express*. Of this the usual evidence is circumstantial ; such for instance, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. The character of the presumptions to be drawn from such circumstances is elsewhere distinctively considered.<sup>2</sup> But even though no circumstances, prior in date to the fatal act, are in evidence from which malice may be inferred ; yet the character of the injury often supplies means from which such inference may be made. Death occurs by poison given by a person who is cognizant of the nature of the drug ; or by a pistol shot aimed at the breast of the deceased. A *prima facie* case of malice is made out by evidence of this kind ; and it becomes necessary for the defendant, after such a case, to purge himself of malice by showing that the injury was inflicted by him accidentally, or in case of the pistol shot, or of a wound by a deadly weapon (for in poisoning such an excuse is not conceivable), in self-defence.<sup>3</sup>

§ 31. *Malice when existing presumed to continue.*—Supposing malice to be proved to exist a short time before the homicide, it will be presumed to have continued down to the homicide, unless modifying circumstances are shown to have taken place, or the defendant is in some other way proved to have acted under fresh controlling motives.<sup>4</sup> Thus, where it appeared that the deceased had threatened the prisoner, about three weeks before, that he would kill him ; that they met in the street on a starlight night when they could see each other ; that the deceased pressed for a fight, but the prisoner retreated a short distance ; that when the deceased overtook him, the prisoner stabbed him with some sharp instrument which caused his death, and at the time of this meeting the deceased had no deadly weapon ; it was held, that in such a case, to mitigate the offence from murder, it must appear, from the previous threats and the circumstances attending the

<sup>1</sup> 1 Hale, 451 ; 4 Black. Com. 199.

<sup>2</sup> See fully *infra*, § 480.

<sup>3</sup> *Infra*, § 628 ; Whart. Cr. L. 7th ed. § 707 *et seq.*

<sup>4</sup> Wh. Cr. L. § 948–9, 986. See *infra*, § 180.

rencontre, that the killing was in self-defence, the presumption being that the killing was malicious.<sup>1</sup> Yet this presumption is not one of law, to be imposed in all cases by the court, but is one of fact, to be drawn or repelled by the circumstances of the particular case. On the one side we must remember that it is not a law of our nature that an intention once formed always continues; and we must also remember that it is far from being the case that by those who threaten crime, crime is uniformly executed. The most deliberate assassinations are those whose preparations are most artfully concealed; while those who are apt the most noisily to threaten are often those who are the most reluctant to execute. On the other side, when the defendant is proved to have killed the deceased; and when the defendant is shown to have entertained, a short time before the killing, malice to the deceased; then a jury may fairly draw the inference, in lack of any exculpatory testimony from the defence, that the killing was malicious.<sup>2</sup>

§ 32. *Duration of intent.* — No human gauge existing by which duration of intent can be measured, we are obliged to resort for this purpose to the same probable reasoning by which the existence of intent is proved. A. shoots B. in the public streets, without authority and without provocation. As reasonable beings usually premeditate any important step they take, we infer that A. premeditated this shot; and this inference is sufficient proof, in the lack of all other evidence, of premeditation. This is what is meant by the expression we frequently meet with in the books, that instantaneous intent is enough. It is not meant by this that it is enough if the defendant formed the intent coincidentally with the blow, for this we have no way of determining. What is meant is, that even where we have no other proof of intent prior to the blow, from the blow itself we may infer the intent.<sup>3</sup>

§ 33. *Intent at time of killing enough.* — Hence it is constantly laid down that intent at the time of killing is enough. It is not meant to assert by this that a person who, under a sudden impulse, kills another is guilty of murder. To say this would be

<sup>1</sup> State v. Scott, 4 Ired. 409.

v. Cornell, 2 Mason, 91; People v.

<sup>2</sup> Infra, § 180.

Moore, 8 Cal. 90; Fahnestock v. State,

<sup>3</sup> See People v. Clark, 7 N. Y. 385; \* 23 Ind. 231; State v. Holme, 54 Mo. Com. v. Drum, 58 Penn. St. 9; U. S. 153; and see infra, § 180-1.

unwarranted, for the reason that we have no means of saying that a particular impulse is sudden. What we have a right, however, to say, and what the law means by this maxim to say, is this, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer (as a presumption of fact, but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant.<sup>1</sup>

§ 34. *Malice does not require physical contact at time of killing.* — Malice may be exerted against a party in his absence; as where A. lays poison for B. in his victuals, which B. afterwards takes and dies. So, where A. procures an idiot or lunatic to kill B., which he does. In both instances A. is guilty of the murder as principal.<sup>2</sup>

*Doubt as to malice.* — There may be a class of cases, to use the words of Chief Justice Shaw, “when, if reasonable doubt arises as to malice, the court would properly instruct the jury to

<sup>1</sup> *R. v. Noon*, 6 Cox C. C. 137; *State v. Toohey*, 2 Rice's Dig. 104; *U. S. v. Cornell*, 2 Mason, 91; *Woodside v. State*, 2 Howard's Miss. R. 656; *Dain v. State*, 2 Humphreys, 437; *Coffee v. State*, 3 Yerger, 288; *State v. Lipsey*, 3 Dev. 485; *People v. Moore*, 8 Cal. 90; *Lanegan v. People*, 50 Barbour, 266; *People v. Clark*, 7 N. Y. 385; *Com. v. Drum*, 58 Penn. St. 9; *McAdams v. State*, 25 Ark. 405; *Fahnestock v. State*, 23 Ind. 231; *Green v. State*, 13 Mo. 382; *Mitchum v. State*, 11 Ga. 615; *People v. Sullivan*, 3 Selden, 396; *U. S. v. McGlue*, 1 Curt. C. C. 1; and see *infra*, § 180-2. In *People v. Nixon*, N. Y., May, 1873, Judge Ingraham said: “The judge charged the jury ‘that the design to take life may be formed upon the instant of doing the deed of death.’ He had before told them that ‘there was the premeditation, and if they did not find such premeditation there could not be a conviction for murder.’ There is nothing in this inconsistent with the

settled law upon the subject. In *People v. Clark*, 7 N. Y. 385, the charge was: ‘If the jury believed the killing was with the intention to kill, though that intention was formed at the moment of striking the fatal blow, it was murder.’ And the chief justice, in delivering the opinion of the court, says: ‘If there be sufficient deliberation to form a design to kill, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months.’ This has been the leading case. It has never been overruled or departed from. The words used by the learned justice in the charge in this case are almost the same as those used in the case cited.” But see statute of May 29, 1873.

<sup>2</sup> *Wh. Cr. Law*, 7th ed. 154, 210 m, 965, 1075, 1114 a; see *infra*, § 326.

find manslaughter ; as where a mother exposed her infant child in a garden, and it was devoured by a kite, or where the death of a pauper was produced by constant shifting, on the part of the overseers of the poor, from parish to parish.”<sup>1</sup> The Roman maxim, “*in dubio mitius*,” should in such cases prevail.<sup>2</sup>

<sup>1</sup> Com. v. York, 9 Metc. 93.

<sup>2</sup> See more fully infra, § 194, 660.

## CHAPTER III.

### MALICIOUS HOMICIDE.

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|---|---|
| <p>I. TOWARDS THE PARTY KILLED, § 35.<br/>Express malice involves sedate, deliberate mind and formed design, § 35.<br/>Intent to kill, § 38.<br/>Evidence of such intent is inferential, § 39.<br/>Intent to do bodily harm, § 40.<br/>Intent to produce a miscarriage, § 41.</p> <p>II. TOWARDS A THIRD PARTY, WHEN THE BLOW FALLS ON THE DECEASED BY MISTAKE, § 42.<br/>Adjudicated cases, § 43.<br/>Discussion of question on principle, § 48.</p> <p>III. TOWARDS THE PUBLIC IN GENERAL OR TO A PARTICULAR BODY OF MEN, § 52.<br/>Malice to a class covers malice to an individual, § 52.</p> | <p>When act is negligent, offence is but manslaughter, § 54.</p> <p>IV. INTENT TO COMMIT COLLATERAL FELONY, § 55.<br/>By older common law writers such killing is murder, § 55.<br/>Recent doubts as to this point, § 56.<br/>Position of American legislation as to the more heinous felonies, § 57.<br/>But at common law, doctrine unsustainable in reason, § 58.</p> <p>V. INTENT TO COMMIT COLLATERAL MISDEMEANOR, § 64.<br/>Accidental homicide, incident to an unlawful act, is manslaughter, § 64.<br/>Assaults, § 65.<br/>Production of abortion, § 66.<br/>Riots, § 67.<br/>Illicit sexual intercourse, § 68.</p> |
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#### I. TOWARDS THE PARTY KILLED.

§ 35. *Express malice* is said to exist when one person kills another with a sedate, deliberate mind and formed design. Such formed design, as will be hereafter seen,<sup>1</sup> may be evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. Malice is *implied* from any deliberate, cruel act committed by one person against another, however sudden; as where a man kills another suddenly without any, or without a considerable provocation, and with a deadly weapon, it being a maxim based on ordinary experience, that no person, unless under the influence of malice, would be guilty of such an act upon a slight or no apparent cause. And, as will be seen presently, where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, we are led, by the same processes

<sup>1</sup> *Infra*, § 669-696.



of inductive reasoning to infer a general malice from such a depraved inclination to mischief.

§ 36. Yet it must be admitted that the distinction between express and implied malice, approved as it is by the old standards, is unsustained by sound reason. There is no case of homicide in which the malice is not implied; none in which it is not inferred from the circumstances of the case. It may be proved that the defendant said, "I intend to kill A.;" and it may be proved that he afterwards actually killed A.; yet it is possible to suppose, as in some cases has actually been proved, that the threat was braggadocio, and the death accidental. We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent, more or less satisfactorily, from his acts.

§ 37. Malice in this sense may be considered under the following heads:—

1. Intent to kill.
2. Intent to do bodily harm.

§ 38. *Intent to kill.*—This head admits of no question in its primary sense. Where there is a deliberate intent to kill, unless it be in the discharge of a duty imposed by the public authorities, or in self-defence, or in necessity, the offence must be murder at common law. And as will hereafter be more fully seen,<sup>1</sup> an intermediate provocation, immediately after the happening of which the offence occurred, forms no defence.<sup>2</sup> The reason of this is obvious, for if all that was necessary for a man to do to relieve himself from the guilt of murder was such provocation, there would rarely be a case of homicide without such provocation being intentionally provoked. In a leading case on this point, the prisoner, with the deceased and another brother, and some neighbors, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgel by agreement. All this time no token of anger appeared on either side, till the prisoner, in the cudgel-play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good

<sup>1</sup> *Infra*, § 586.

<sup>2</sup> 1 *Russ. on Crimes*, 515.

earnest ; but the company interposing, they were soon parted. The prisoner then quitted the room in anger ; and when he got into the street, was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reprov'd for using such expressions, he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body." The deceased and the rest of the company continued in the room where the affray happened ; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him in to the company ; but the prisoner answered, "I will not come in." "Why will you not ?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not ; and added, "Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you, stand off or I'll stab you ;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little ; and the prisoner, shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him* ? Every circumstance in the case showed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that

weapon ; but the deadly weapon was all the while carefully concealed under his coat, which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel ; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off ; but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second ; but he advanced as fast, and took the revenge he had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the death, did not alter the case ; nor did the preceding quarrel ; because, all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed.<sup>1</sup>

§ 39. *Evidence of intent.* — As has been already incidentally noticed, and as will be presently more fully seen, evidence of intent and of malice is necessarily inferential. The circumstances from which conclusions in this respect can be drawn will be hereafter distinctively discussed.<sup>2</sup>

The process of reasoning is that of the ordinary inductive syllogism : from certain facts malice is to be inferred ; here these facts exist ; hence here malice is to be inferred. The facts from which the inference of malice is to be drawn will be analyzed in a subsequent chapter.<sup>3</sup> Among them may be now simply noticed prior quarrels between the defendant and the deceased ; expressions of animosity by the defendant to the deceased ; preparations for homicide ; money on the deceased's person of which he was robbed at the homicide ; use of a deadly weapon. The latter fact — use of a deadly weapon — has been frequently singled out as affording in itself a presumption in law that the killing was malicious. If "law," when thus used, means "law of probable reasoning," then the statement is true ; if it means "*presumptio juris*," which the judge is arbitrarily to apply, then the statement is false. An executioner, a surgeon, a person acting obviously in self-defence, each uses a deadly weapon ; yet neither the executioner, the surgeon, nor the person so acting in

<sup>1</sup> Mason's case, Fost. 132 ; East P.  
C. c. 5, s. 23.

<sup>2</sup> See *infra*, § 669–696.

<sup>3</sup> See *infra*, § 671 *et seq.*

self-defence is presumed, from the mere fact of the weapon being deadly, to be acting maliciously. The true rule is that all the facts of the case taken together are to be considered, and from these the question to be decided is whether the defendant acted maliciously.<sup>1</sup>

§ 40. *Intent to do bodily harm.* — At common law, the intent to do “enormous” or “severe” bodily harm, followed up by homicide, constitutes murder; though, as will be seen hereafter, such an offence falls in this country, in those states where this distinction exists, under the head of murder in the second degree. Homicides of this character are numerous; and it is easy to suppose of homicide in a duel that may be so ranked, *e. g.* where the intention was to *maim*, not to *kill*. The distinction, in a case of this kind, is often slight; and when a statutory line is to be followed, it has been held that when the damage intended was such as would probably result in death, it is murder in the first degree, even though death may have been but incidental to the offender's purpose.<sup>2</sup> In all cases of such outrageous hurt as to make the death a natural consequence, we have a right to infer such an intent; but it is otherwise when the hurt was less serious, and the presumption of an intent to kill less violent. Independent of the statutes, it has been said that though A. intend only to severely *beat* B. in anger, from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequences. He beat B. with an intention of doing him great bodily harm, and is therefore answerable for all the harm he did.<sup>3</sup> So if a large stone be thrown at one with a deliberate intent to seriously hurt, though not to kill him, and by accident it kill him, or any other, this is murder.<sup>4</sup> But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in such cases. If the intent be merely to inflict a slight chastisement, and death arises from some peculiarity in the deceased's constitution (*e. g.* inflammation from a scratch), then the offence is but manslaughter; and so, where

<sup>1</sup> See cases cited to § 944, Wh. Cr. Law, 7th ed.

<sup>2</sup> Fost. 259. See *supra*, § 23-25.

<sup>4</sup> 1 Hale, 491.

<sup>3</sup> Com. v. Green, 1 Ashm. 289.

the injury is only mischievously inflicted, with no intention seriously to hurt.<sup>1</sup>

In Vermont, in a case showing peculiar depravity of guilt, where a man, in order to have unlawful sexual intercourse with a girl, used artificial means, with her consent, to make such connection practicable, as a result of which the girl died, the killing was held but manslaughter.<sup>2</sup> This case, supposing the girl was old and intelligent enough to consent, may be sustained on the ground of *volenti non fit injuria*;<sup>3</sup> but not otherwise.<sup>4</sup> For to constitute grievous bodily harm, it is not necessary that the injury should be either permanent or dangerous; if it is such as seriously to interfere with comfort or health, the allegation is sustained.<sup>5</sup>

§ 41. *Intent to produce a miscarriage.*— Under this head we may class attempts to produce miscarriages, resulting in the death of the mother. Killing of this character has been correctly held to be murder at common law.<sup>6</sup> To rest these decisions, however, as is sometimes done, on the ground that the killing was incidental to the commission of a felony, is unsafe, even in those states in which the production of miscarriage is a felony by statute. The principle that killing, when in the perpetration of a collateral felony, is murder at common law, is open, as will presently be seen,<sup>7</sup> to so many grave objections, that it ought not to be, at all events, unnecessarily invoked. It is sufficient, in order to sustain the ruling that killing the mother, when attempting to cause her to miscarry, is murder at common law, to rest on the fact that such attempt involves a serious bodily harm to the mother. Such being the case, the offence is murder at common law, or murder in the second degree under our American statutes.<sup>8</sup>

<sup>1</sup> *Infra*, § 72.

<sup>2</sup> *State v. Center*, 35 Vt. 378.

<sup>3</sup> See Whart. C. L. 7th ed. 751 *f.*

<sup>4</sup> *R. v. Cox*, R. & R. C. C. 362; 1 Leach, 71.

<sup>5</sup> *R. v. Ashman*, 1 F. & F. 88.

<sup>6</sup> *State v. Moore*, 25 Iowa, 128; *Smith v. State*, 3 Reding. (Me.) 48; *Chauncey, ex parte*, 2 Ashmead, 227; *Com. v. Jackson*, 15 Gray, 187. See *R. v. Gaylor*, D. & B. C. C. 288; 7 Cox C. C. 253; and see *infra*, § 41, 192.

<sup>7</sup> *Infra*, § 55.

<sup>8</sup> *Chauncey, ex parte*, 2 Ashmead, 227; *State v. Moore*, 25 Iowa, 128. See *infra*, § 192.

Lord Macaulay, in his Report on the India Penal Code, thus speaks:—

“Under the provisions of our Code, this case would be very differently dealt with according to circumstances. If A. kills Z. by administering abortives to her, with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpa-

## II. TOWARDS A THIRD PARTY, WHEN THE FATAL BLOW FALLS ON THE DECEASED BY MISTAKE.

§ 42. Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter. If A., having malice against B., strikes at and misses him, but kills C., this is murder in A. ; but if the blow had been without malice and under such circumstances that if B. had died, it would have been but manslaughter, the killing of C. would have been but manslaughter.<sup>1</sup> So if A. gives poison to B., intending to poison her, and B., ignorant of it, gives it to a child, who eats it and dies ; this is murder in A., but no offence in B. ; and this, though A, who was present at the time endeavored to dissuade B. from giving it to the child.<sup>2</sup> So where Plummer, and seven others, opposed the king's officers in the act of seizing wool. One of those persons shot off a fusee and killed one of his own party. The court held, in giving judgment upon a special verdict, that as the prisoner was upon an unlawful design, if he had in pursuance thereof discharged the fusee against any of the king's officers that came to resist him, in the prosecution of that design, intending to kill such officer, and by accident had killed one of his own accomplices, it

ble homicide, which will be voluntary culpable homicide by consent if Z. agreed to run the risk, and murder if Z. did not so agree. If A. causes miscarriage to Z., not intending to cause Z.'s death, nor thinking it likely that he shall cause Z.'s death, but so rashly or negligently as to cause her death, A. is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A. took such precautions that there was no reasonable probability that Z.'s death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have fore-

seen, or by some peculiarity in Z.'s constitution such as there was no ground whatever to expect, A. will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage." See for further extracts from this report, *infra*.

<sup>1</sup> 1 Hale, 379, 439, 466 ; Dyer, 128 ; Kel. 111, 112, 117 ; Pult de Pace, 124, .b ; Fost. 261 ; 1 Hawk. c. 31, 542 ; State v. Cooper, 1 Green N. J. 381 ; State v. Benton, 2 Dev. & Bat. 196 ; State v. Fulkerson, 1 Phil. (N. C.) L. 233 ; R. v. Holt, 7 C. & P. 519 ; *supra*, § 19, 26 ; *infra*, § 182.

<sup>2</sup> 1 Hale, 230 ; 2 Plowden Com. 474. *Supra*, § 22-25 ; *infra*, § 92.

would have been murder in him ; the reason being that if a man out of malice to A. shoot at him, but miss him and kill B., it is no less a murder than if he had killed the person intended.<sup>1</sup> So where A., a policeman, is lawfully endeavoring to arrest B., and B. shoots at the policeman, and kills accidentally C., this is murder in B.<sup>2</sup> The same rule applies, as will be hereafter seen, to cases of killing in riots. A rioter intends to kill an enemy, but kills a friend. The killing, in such case, according to the authorities, is to be treated as of the same grade as it would have been if the person killed was the one whom the defendant intended to kill. Even where the intent was to inflict only serious bodily harm, this rule is in force. Thus, where the prisoner fired a loaded pistol at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball hit another person and killed him, it was held in South Carolina that the crime was murder.<sup>3</sup> Under the present usual statutory provisions, such offence would be murder in the second degree.<sup>4</sup>

§ 43. On the other hand, where the blow is designed in hot blood, or under such circumstances that if the person aimed at had been killed, the offence would have been but manslaughter ; then, as has already been incidentally noticed, it is but manslaughter to kill the person actually killed. Killing in affrays and riots, as we have just seen, is thus to be qualified. The following case is strong to this point: A quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier who had before driven a part of the mob down the street with his sword in his scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street ; and on their pressing on him he struck at them with the flat side, and as they fled pursued them. The other soldier in the mean time had got away, and when the prisoner returned he asked whether they had murdered his comrade ; and being several times again as-

<sup>1</sup> 12 Mod. 627 ; Kelyng, 111 ; Lord v. Mawgridge, Kelyng, 131, 132 ; 9 Raym. 1581 ; 9 St. Tr. 112 ; Higgins's case, Dyer, 128 ; Pl. 60, 474 ; Crompt. 101 ; 9 Co. 81, Agnes Gore's case ; Williams's case, cited in the Queen

<sup>2</sup> Angell v. State, 36 Tex. 542.

<sup>3</sup> State v. Smith, 2 Strobb. 77.

<sup>4</sup> See *infra*, § 170 *et seq.*

saulted by the mob, he brandished his sword and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner ; but before he passed the prisoner went up to him and struck him on the head with the sword, of which he presently died. This was holden manslaughter : it was not murder, because there was a previous provocation, and the blood was heated in the contest ; nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner.<sup>1</sup> If in this case, where the defendant actually intended to kill the deceased, though under a mistake as to who the latter was, the qualification is 'applicable, *a fortiori*, does the defence apply when the killing of the deceased was purely accidental.

§ 44. So also we must allow this mitigation as to intent to be extended to cases of such peculiar excitement as negatives the implication of malice. Of this we have the following illustrations : —

§ 45. The prisoner, having had a quarrel with his wife, and aimed a blow at her with an axe, which fell on the head of his infant son, then in her arms, by which he was instantly killed, it being shown that the prisoner was ignorant of his child's position, and was at the time in the heat of blood seeking to avenge himself on his wife for a supposed injury, it was held that as the case was to be considered as if the wife had been the victim, the same grade of homicide would attach to the killing of the child as it would have done to that of the wife, if she had been killed.<sup>2</sup>

§ 46. A widow, finding that one of her sons had not prepared her dinner, as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron used as a poker, intending to frighten him, and seeing she was very angry, he ran towards the door of the room, when she threw the poker at him, and it happened that the deceased was just coming in at the moment, and the iron struck him on the head, and caused his death ; Park, J. A. J., said to the jury : " No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a

<sup>1</sup> Foster, 262 ; 1 Hawk. c. 31, s. 44 ;    <sup>2</sup> Com. v. Dougherty, 7 Smith's Crown Cas. Res. Leach, 151, S. C.    Laws, 696.



blow is aimed at an individual unlawfully, — and this was undoubtedly unlawful, as an improper mode of correction, — and strikes another and kills him, it is manslaughter; and there is no doubt if the child at whom the blow was aimed had been struck, and died, it would have been manslaughter, and so it is under the present circumstances.”<sup>1</sup>

§ 47. So also if A., in lawful self-defence, or in lawful prevention of a felony, intending to kill B., accidentally kills C., this is excusable or justifiable homicide, as the case may be.<sup>2</sup>

§ 48. *Discussion of question on principle.* — The decisions just given are probably too firmly settled to be now shaken; but it is not to be denied that though in Anglo-American courts they have been accepted as based on a principle that is indisput-

<sup>1</sup> *R. v. Conner*, 7 C. & P. 438. See *Bratton v. State*, 10 Humph. 103; and *infra*, § 182.

<sup>2</sup> *Levett's case*, Cro. Car. 438; *Aaron v. State*, 31 Ga. 167; *Morris v. Platt*, 32 Conn. 75. In the latter case, *Butler, J.*, said: —

“If the defendant had been in the act of firing the pistol at an assailant in lawful self-defence, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result; or if his aim was perfect but a sudden violent puff of wind had diverted it, or the ball after it passed from the pistol; and, in either case, the ball, by reason of the diversion, had hit the plaintiff, the accident would have been so affected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.”

“And in the second place, if, while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably

diverted toward the plaintiff; or if, while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball, passing over the spot, hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required, or the circumstances permitted, the accident was what has been correctly termed, ‘unavoidable under the circumstances;’ and whether the defendant should in such case be held liable or not, is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act, though strictly lawful and necessary, was done with wantonness, negligence, or folly; then, although the wounding was unintentional and accidental, it is conceded and undoubtedly true, that the defendant would be liable.”

able, this principle has been regarded by foreign jurists as beset by peculiar doubts. A. intends to shoot B., but missing him accidentally and unintentionally kills C. On the one side it is argued by Buri and Walther, reaching the same result as that reached in the cases above cited, that A.'s action in both relations is to be viewed as a unit; that as his intent was to kill, and as the killing took place in pursuance of this intent, the case is analogous to that of a man shooting into a crowd intending to kill any one whom he may hit, in which case no one doubts that he is chargeable with the murder of the person whom he kills. To this Bar has published, in his *Treatise on Causalzusammenhange*, an answer which it may not be out of place here to condense. He begins by insisting that the doctrine of causation relates, not to the vague and unreal, but to the concrete and actual. No one intends to kill an indefinite man, because there is no such thing as an indefinite man to be killed. It is true that the mind of the assailant may fluctuate between two or more persons, as to which he will kill; but the moment he acts he has but a specific person before him. Nor does it alter the case when he shoots into a crowd. He has in this case the crowd, consisting of an ascertainable number of individuals, in view; and although he leaves it to chance to determine who is to be struck, yet the group to whom this chance is limited is as capable of positive apprehension and of concrete intent as are the individuals of whom the group is composed. We never, even in the latter case, say, "A. murdered a man in the abstract;" it is always, "A. has murdered B.," or "a particular man." . . . Suppose, to illustrate, that two targets are placed, at a shooting-match, at equal distance from the marksman. He is at liberty to choose at which target he will shoot. He chooses No. 1, aims at it, and hits No. 2. Is his skill to be placed at the same grade as that of a competitor, who chooses No. 2 and hits No. 2? Now if the view here contested be true, it would be sufficient to say, "A. has aimed at a target and has hit a target," which is absurd. . . . The law, we admit, makes it a crime to kill any man maliciously; but it is far from saying that malice towards one man and killing another can make together one malicious homicide. Suppose C., instead of accidentally receiving A.'s shot, wilfully throws himself in its range in order to commit suicide. A., on the view here con-

tested, would be indictable for the malicious murder of one who really murdered himself.

§ 49. It is said that C. is to be substituted for B., and that killing C. is to be treated on the basis of this substitution, just as we would treat the killing of B. But we cannot positively affirm that B. would have been shot had not C. intervened. It may be that the very faltering which led to the miss-shot was caused by a want of resolute purpose; it may be that the taking so great a distance at which to shoot at B. was a result of an unwillingness to make a sure shot. It may be that the attempt was of a character which necessarily failed. At all events, we have here the spectacle of an attempt, an offence which has a milder punishment, visited with the severe punishment of the consummated offence, simply because the defendant has accidentally committed a distinct offence. To attempts, a milder punishment is assigned, on the ethical ground, that as a usual thing a consummated crime supposes greater care in preparation, and greater firmness in execution, and therefore involves a higher degree of criminality, than does an unconsummated crime. If you meet this by saying that in this case the attempt on B. only accidentally failed, then you make the doubt, instead of telling for, tell against the accused, and thus you violate the maxim *in dubio mitius*. . . . The question is not to be confounded with that of *dolus alternativus*, which exists when A., intending to shoot either B. or C., shoots C. This is clearly murder, for in such case there is at once a killing and an intent to kill the person killed. . . . Nor can we fall back on *a priori* reasoning on the basis of the defendant's intent; and hold that because the defendant intended to kill and a killing followed, therefore the intent to do one thing, and the doing another, are to be fused into one malicious killing. The absurdity of this will be seen by the following illustration: A. intends to kill B.; he shoots at C., whom he mistakes for B., but when he fires, his gun bursts and kills D. No doubt A. intended to kill some one, and that some one was killed; but the fallacy is in asserting that because some one was killed, therefore this some one was the one at whom A. aimed. Or push this a little further. A. manufactures an explosive machine, and is filling a shell intending to kill B., when the shell explodes and kills C. This, on the principle here contested, is murder, and there is no way, if we accept that view, of preventing an intent to kill from

coalescing with any collateral accidental homicide which may occur through the instrumentality put in motion to carry out the intent. Yet it is not only possible that in the mean time the defendant may have repented and abandoned his intent, but the law, until the intent is consummated, always assumes such a repentance and abandonment as possible, and hence assigns a lighter punishment to the attempt. Supposing the actual homicide to be a mere accident, to which no blame is imputable, we thus use this accident, which occurs to an object wholly collateral, to change an attempt into a murder. The defendant really did not kill B., but he is convicted of killing B. because C. was killed by means with which the defendant had legally nothing to do.

§ 50. Such are some of the points which are raised in reply to the doctrine that in cases of aberration, as they are called, the killing of one person is to be tacked to the intent to kill another, so as to form one complete murder. Were the question still open, then it would be both humane and philosophical to hold that, so far as concerns B., the person whom A. intends to kill, but does not actually kill, A. is guilty only of an attempt to kill. What A.'s offence is as to C., who is not seen by A., but who accidentally interposes, and receives a fatal wound, depends upon whether the shooting was of such a character (*e. g.* from the place of firing being one in which persons are accustomed to pass) as implies negligence in A. If so, then the killing of C. is manslaughter. But as A. did not intend to kill C., then the killing of C. is not under such circumstances murder. That the intent to kill B., and the actual killing of C., cannot be lumped so as to make an offence, is illustrated by the fact that supposing B. to have been killed, and the shot to have pierced him and then killed C., then the killing of B. and C. are distinct offences, to be separately tried.<sup>1</sup>

§ 51. So far, however, as concerns the class of cases immediately before us (those in which one person is killed by a mortal blow designed for another), the doctrine of transferred imputation, or *aberration*, as it is called in the Roman law, is too firmly settled to be shaken. How far it can be sustained in cases where

<sup>1</sup> *R. v. Champneys*, 2 M. & R. 26; 338; *Vaughan v. Com.* 2 Va. Ca. 273; *State v. Benham*, 7 Connect. 414; *State v. Standifer*, 5 Porter, 523; *Wh. People v. Warren*, 1 Parker C. R. Cr. L. 7th ed. § 565.

homicide is committed accidentally, when the intent was to perpetrate a felony other than murder, will be presently discussed.

### III. TOWARDS THE PUBLIC IN GENERAL, OR TO A PARTICULAR BODY OF MEN.

§ 52. *Malice to a class covers malice to an individual.*— When an action unlawful in itself is done with deliberation, and with intention of killing, or inflicting grievous bodily harm, though the intention be not directed to any particular person, and death ensue, it will be murder at common law.<sup>1</sup> But if such an original intention does not appear, which is matter of fact, and to be collected from circumstances given in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued was unlawful.<sup>2</sup> Thus, if a person, breaking in an unruly horse, wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder at common law. For how can it be supposed that a person wilfully doing an act, so manifestly attended with danger, especially if he showed any consciousness of such danger himself, should intend any other than mischief to those who might be encountered by him?<sup>3</sup> So if a man recklessly and maliciously throw from a roof into a crowded street, where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death on such as it might fall, and death ensue, the offence is murder at common law.<sup>4</sup> So, also, it is murder maliciously to fire into a crowd.<sup>5</sup> And upon the same principle, if a man, knowing that people are passing along the street, maliciously throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of previous malice, though not directed against any particular individual; it is no excuse that the party was bent upon mischief generally.<sup>6</sup>

<sup>1</sup> 1 Hawk. ch. 29, s. 12; Com. v. Drum, 58 Penn. St. 9; Herrin v. State, 33 Texas, 638; Hopkins v. Com. 50 Penn. St. 9; R. v. Fretwell, L. & C. 443; 9 Cox C. C. 471; supra, § 19, 26; infra, § 183, 671.

<sup>2</sup> 1 Russ. on C. 539; Foster, 261; Galliher v. Com. 2 Duvall, 163.

<sup>3</sup> 1 Hale, 476; 4 Black. Com. 200; 1 East P. C. 231; infra, § 107.

<sup>4</sup> Com. v. Dougherty, 7 Smith's Laws, 696; Boles v. State, 9 S. & M. 284; infra, § 99.

<sup>5</sup> Galliher v. Com. 2 Duvall, 163; R. v. Fretwell, L. & C. 443; 9 Cox C. C. 471; infra, § 88.

<sup>6</sup> 1 Hale, 475; 3 Inst. 57; 1 East P. C. 231.

§ 53. The lines of this species of homicide it is very important to preserve intact, for as has been pointedly observed, "Particular malice has the limited bounds of the person who is the object of it, and who may be on his guard against it; but general malice has a wider scope, and falls on the unsuspecting. Is a man who fires a pistol at an individual against whom he has ill-will less criminal than one who fires a pistol at a crowd of an hundred people, against whom he has ill-will as a body, or as a part of the community? The absence of the personal animosity really aggravates the crime. In cases of particular malice, the sophistry of the passions often gives the act the character of a wild retribution, and the assassin persuades himself that he is getting rid of a monster who is a curse to society. This reasoning is perverse and dangerous; but is the state of the mind less detestable in which no wrongs, real, exaggerated, or imaginary, inflame the passions against the individual, but in which the knife is driven home to his heart, simply because he wears the form of a brother man? Which would argue the higher degree of depravity, the resolution, "I will kill A. and B., who have insulted or injured me," or "I will kill the first man I meet, be he who he may?"<sup>1</sup>

§ 54. *But when act is negligent offence is but manslaughter.*—Where, however, the injury is inflicted negligently, without such recklessness as implies malice, as in negligently letting a piece of timber fall from a roof,<sup>2</sup> or in negligently driving in the public streets,<sup>3</sup> or in negligently driving a locomotive engine;<sup>4</sup> then the offence is but manslaughter.

#### IV. INTENT TO COMMIT COLLATERAL FELONY.

§ 55. *By older common law writers such killing is murder.*—So far as this concerns the homicide of one person where the intent was to slay another, the subject has been already discussed; and so far, also, as concerns homicide committed in the perpetration of arson, rape, robbery, or burglary, it will be discussed under the head of statutory homicide.<sup>5</sup> Independently of these points, it is declared by the old English text writers, as a general rule, that if the act on which death ensue be *malum in se*, it

<sup>1</sup> Mr. Fonblanque, in *Examiner* of May 11, 1850. See *Boles v. State*, 9 Sm. & Mars. 284.

<sup>2</sup> *R. v. Hull*, Kel. 40; *R. v. Rigmar-don*, 1 Lewin, 180; *infra*, § 99.

<sup>3</sup> *R. v. Timmins*, 7 C. & P. 499; *R. v. Grout*, 6 C. & P. 629; *R. v. Dalloway*, 2 Cox C. C. 509; *infra*, § 107.

<sup>4</sup> See *infra*, § 94.

<sup>5</sup> *Infra*, § 184.

will be murder or manslaughter, according to the circumstances; if done in prosecution of a felonious intent, but death ensued against or beside the intent of the party, it will be murder; but, on the other hand, if the intent went no further than to commit a bare trespass, it will be manslaughter. The illustration usually given is that where A. shoots at the poultry of B., and, by accident, kills B. himself; if A.'s intent were to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent; but if it were done wantonly and without that intent, it will be merely manslaughter.<sup>1</sup> And frequently has this rule been announced as unquestioned law by courts in the United States.<sup>2</sup>

§ 56. *Recent doubts as to this point.* — Yet, peremptory as has been the assertion of this principle, there is reported no modern conviction of common law murder, in a case in which there was no evidence of malicious intent towards the deceased, and in which the felonious intent proved was simply an intent to commit a collateral felony. And that an intent to commit larceny cannot be now used to prove an intent to kill is emphatically declared by a learned English judge (Blackburn, J.) in his testimony in 1874, before the Homicide Amendment Committee, as given in a note to this paragraph.<sup>3</sup>

<sup>1</sup> *Fost.* 258-9; *Plummer's case*, 1 *Hale*, 475; 3 *Inst.* 56; *Kel.* 117; *Sum.* 56; 6 *St. Tr.* 222; 1 *Hawk. c.* 29, s. 11; c. 31, s. 41.

<sup>2</sup> See particularly *Com. v. Dougherty*, 7 *Smith's Laws*, 696; *State v. Cooper*, 1 *Green N. J.* 381; *State v. Smith*, 2 *Strobh.* 77; *Smith v. State*, 3 *Reding. (Me.)* 48; *State v. Moore*, 25 *Iowa*, 128.

<sup>3</sup> The following is Mr. Fitzjames Stephen's testimony on this point before the committee just mentioned:

"11. Would you just give us the history of the law of murder, with the twisting of the 'malice aforethought?' — I will do so in a moment; but there is one remark which appears to me pertinent to this point. The point which I wished to refer to was what I may call the notorious case

about the fowl; it is a thing that everybody knows who has paid any attention to the subject.

"12. Will you state the case for the information of some of us? — I will read the case, and then there can be no mistake about it. There is a long discussion about the whole of this matter, which you will find in *Russell on Crimes*, page 741; the editor of *Russell* quotes Lord Coke's 3d Institute, 56: 'If the act be unlawful it is murder; as if A. meaning to steal a deer in the park of B., shoots at the deer, and by the glance of the arrow kills a boy that is hidden in a bush, this is murder.' Then he quotes various authorities to show that if shooting at a tame fowl you accidentally kill the owner, it is murder."

Then he goes on: "In '*Rex v.*

§ 57. *Position of American legislation as to the more heinous*

Plummer,' Kel. 117, the question is discussed in the judgment of the chief justice, and Lord Coke's dictum is explained to mean " (this is the more lenient form of the doctrine) " that if two men have a design to steal a hen, and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design was felonious; and it is said, that with that explanation the books cited do warrant that opinion," i. e. Coke's opinion, " that if you shoot at a fowl with intent to steal it, and a man is killed, it is murder by reason of the felonious intent." And then the editor of Russell goes on: " There is, therefore, much in the books on the subject; and with all deference to the opinions of others" (he means of Baron Bramwell in particular, who decided, not exactly against it, but as if he did not quite like it), " the rule, that any one who deliberately attempts to commit a felony, and thereby occasions death, is guilty of murder, seems to be right." " Now, I do not care whether that is law or not. I am aware that some of the judges have expressed doubts whether, if a man shoots at a fowl with intent to steal it, and if thereby somebody is killed, that really is murder. But, however, I will take it either way; if it is murder, I say that is a perfectly barbarous and monstrous rule, and that rule by itself would be amply sufficient reason for calling upon parliament to alter the law. If it is not murder, you arrive at another consequence, which seems to me to give an equally strong reason for altering the law: and that is, that first Lord Coke says that it is murder; then Hale says that it is murder; ; then Foster says that it is murder; and finally, the most eminent living writer

on the subject, namely, Mr. Greaves, says it is murder, and that half-a-dozen books affirm it to be murder; and, what is more, that it is right that it should be murder.

" Now, if they are all wrong, and it is not murder, I say, how can any one know what the law is on any subject whatever; because every author to whom you have to go for your definition of the crime of murder gives this definition, and draws from it this inference in the strongest and most unflinching manner; and if they are wrong who can ever be sure to be right on any legal question? I think, therefore, that, take it which way you please, admit the rule to be law, or deny it to be law, the inference is the same, namely, that the law is in a state which requires alteration."

The reason why convictions are unknown under this supposed rule is thus given by the same eminent counsel: " Take the case of a poacher who goes out armed at night, and a struggle ensues with the keeper, and death ensues; I believe that is murder under the present state of the law? — Going out at night poaching, I think is a misdemeanor, not a felony; but it might be murder as resisting lawful apprehension. The whole turns upon whether it is felony or misdemeanor.

" If it is a felony, and death results, it would be murder? — It would by the present law.

" But not under this bill? — Under this bill it would depend on the circumstances of the case whether the man intended to kill or do grievous bodily harm. If he did not, it would be only manslaughter.

" Have there been within your experience many such cases as those to which you have alluded; I think you alluded to one or two? — Yes, there



*felonies.* — It has been said that this doctrine is affirmed in the

have been a great many ; but they always get out of them by this means. The judge never really wishes to press the matter or to stand strictly on the law, and the jury have a sort of common sense notion in their own heads that it ought not to be held murder, that the man ought not to be hanged, and they find manslaughter."

Baron Bramwell's testimony on the same point is as follows : —

"The present law is that if a man who is committing a felony happens in the course of it to take a life, he is guilty of murder ; that is to say, if a man shooting at a tame fowl in order to steal it, by some misfortune kills a man that he had no reason to suppose was in reach of the shot, he is guilty of murder. That state of the law, in the extreme case which I put, is preposterous, and ought to be set right, and is set right by this bill. Do you trace that to the present definition of murder ? — No ; I think it is a bad rule at present. Will you state what you object to in the present state of the law ? — The great difficulty is to say what is the definition of murder at the present time.

"I could tell the committee of two cases. One was a curious case which occurred in this way : one of those wretched creatures who wander about till, from weariness or in order to have some place to go to, they set fire to a stack, in order to get put into prison, had set fire to a stack, in Kent, in a farm-yard. It so happened that the fire extended all round the yard ; the whole thing was in flames ; and when the fire was at its height a man was seen rushing about in all directions, to see if he could get out ; he was not able and was burnt to death, upon which the man who set fire to the stack was indicted for murder, and tried before me at Maidstone, upon

this ground, that he committed a felony in setting fire to the stack, and so caused the death of the man. This is rather curious, as illustrating the use of definitions. I was obliged to tell the jury that if they thought the man was sleeping in a barn or anywhere in the farm-yard when the prisoner set fire to the stack, he was by law guilty of murder ; but it fortunately occurred to me to suggest to them that he might have been suddenly attracted by the fire, and have gone to the spot to put it out, or for some other cause ; and I said, 'if that was the case, it was the voluntary act of an intelligent agent getting into the mischief.' He was acquitted upon that, and the jury were glad enough to be able to acquit him. The story is relevant enough, because Mr. Greaves, who is a great authority on these matters, mentions this case in Russell on Crimes, and says in the most peremptory language that I was wrong, and that even in my view of the case the man ought to have been found guilty of murder ; which is a proof of the desirability of having definitions. I may add, I have no doubt I was right. The other case was the explosion at Clerkenwell. I do not mean to say that the chief justice put it upon that ground ; but it was a ground upon which he could have put it, that the man was engaged in a felony then in attempting to rescue a prisoner in jail for felony. The chief justice, when summing up to a jury, did not put it on that ground, but it was susceptible of that."

The evidence of Blackburn, J., before the same committee, is peculiarly important, and has been noticed in the text : —

"I see Sir Michael Foster says : 'The law presumes every homicide to

American statutes dividing murder into degrees. But, as will hereafter be seen, these statutes leave the common law line between murder and manslaughter unchanged.<sup>1</sup>

be murder till the contrary appears;' is that correct?—It is; but like all rules of evidence, practically there is never any difficulty about it. *I believe, in most cases which are not cases of manslaughter, the real question comes to be, was the degree of violence such as to show that either the man intended to kill (in which case nobody would doubt about it), or that he intended to inflict dangerous bodily injury, in which case if death ensues it is murder.* But there is another case of constructive malice which I wish the committee to consider, and to which I will call attention, and it is one which I see there has been something said about, *where a man is committing a crime, and in the course of committing that crime commits violence against any one resulting in his death. There I apprehend, as the law stands, if death ensues it is murder, even though the violence should be such that if it had not been inflicted during the commission of a crime it would have been only manslaughter.* I see Mr. Stephen says he meant to say that that should no longer be so. Now I cannot but think that the law as it stands is better. I will give you an instance of the sort of thing I mean: I have had medical evidence before me which shows that when a person has his breath stopped for a very short time, especially if a person is out of breath, or in a state of excitement which makes it necessary that he should breathe, the result may be fatal; a very slight stoppage of the breath for a very short time will, under such circumstances, produce death,—a much shorter time and a much slighter stoppage than I should have imagined. I have had

evidence that throwing a shawl over the face under such circumstances would in a few seconds cause death. When that takes place, if it has been done in the pursuance of crime, I think it ought to be held to be murder. There was a case on the Western Circuit, not tried by me, but I heard of it, which I may mention. A poor girl was returning home from church, and had to pass over a stile between two hedges, and a ruffian who had lain in wait threw a shawl over her head and dragged her along some distance, intending to carry her to a wood and ravish her. She died before she got there. No one can doubt that the man did not intend her to die; of course, he meant her to live, as otherwise he would not effect his object; and probably he was in ignorance that throwing a shawl over the face of a person in a state of excitement was so very dangerous; but nobody seemed to doubt at the time that even though he did not mean to kill her, yet, as she died in consequence, it was murder, and he was hanged; and I should be very sorry to alter the law so as to say that he should not be hanged, as Mr. Stephen wants to alter it.

"He says in effect in his evidence, he was making an attempt to commit a rape; punish him for that; but do not say it was murder because he was using violence for the purpose of effecting a crime. Where it is personal violence, I think it is murder. *I see he quotes the old case where Coke says, if a man shoots at a deer with intent to steal it (and it was followed up by a case in the reign of Charles II., where he*

<sup>1</sup> *Infra*, § 184.

§ 58. *At common law, doctrine is unsustainable by reason.* — Where a legislature thus creates a statutory offence, the statutory

*shoots at a hen), and totally accidentally there is somebody whom the shot strikes and kills, that would be murder. I can only say I do not believe that is murder at the present day; I should not act upon that; but if you are afraid of that, put in a clause to say that it shall not be; but do not on that account say that a person who intentionally uses personal violence either in the case of a highway robbery or to silence a person giving an alarm of burglary, is not guilty of murder. But I see Mr. Stephen pointedly says, he would not have it murder."* Mr. Russell Gurney then said: "There is not a single text book, is there, where it is not laid down to be murder, if you cause death in the prosecution of a felony?" Judge Blackburn replied: "I think that in all of them they do lay it down; they cite that statement of Lord Coke's and that later case, and they all say that there it is put down; but I do not think that there will be found any instance in which that has ever been acted upon, and I am confident it would not be acted upon now."

Lord Macaulay, in his Report on the India Penal Code, says on this point: "It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it, would be in the highest degree barbarous and absurd. A pilot is navigating the Hooghly with the utmost care and skill; he directs the vessel against a sand-bank which has been recently formed, and of which the existence was altogether unknown till this disaster. Several of his passengers are consequently drowned. To hang the pilot as a murderer on account of this

misfortune would be universally allowed to be an act of atrocious injustice. But if the voyage of the pilot be itself a high offence, ought that circumstance alone to turn his misfortune into a murder? Suppose that he is engaged in conveying an offender beyond the reach of justice; that he has kidnapped some natives, and is carrying them to a ship, which is to convey them to some foreign slave colony; that he is violating the laws of quarantine at a time when it is of the highest importance that those laws should be strictly observed; that he is carrying supplies, deserters, and intelligence to the enemies of the state. The offence of such a pilot ought, undoubtedly, to be severely punished. But to pronounce him guilty of one offence because a misfortune befell him while he was committing another offence, — to pronounce him the murderer of people whose lives he never meant to endanger, whom he was doing his best to carry safe to their destination, and whose death has been purely accidental, — is surely to confound all the boundaries of crime.

"Again, A. heaps fuel on a fire, not in an imprudent manner, but in such a manner that the chance of harm is not worth considering. Unhappily the flame bursts out more violently than there was reason to expect. At the same moment a sudden puff of wind blows Z.'s light dress towards the hearth. The dress catches fire, and Z. is burned to death. To punish A. as a murderer on account of such an unhappy event would be senseless cruelty. But suppose that the fuel which caused the flame to burst forth was a will, which A. was fraudulently destroying: ought this circumstance

definition is absolute; but when there is no statutory enactment, the doctrine that the intent to commit a felony, when collateral to an accidental homicide, constitutes murder, must be rejected for the following reasons. — A man who does not intend to commit murder is held guilty of murder, an offence to which a malicious intent to take life or to do grievous bodily harm is essential. How

to make A. the murderer of Z.? We think not. For the fraudulently destroying of wills we have provided, in other parts of the Code, punishments which we think sufficient. If not sufficient, they ought to be made so. But we cannot admit that Z.'s death has, in the smallest degree, aggravated A.'s offence, or ought to be considered in apportioning A.'s punishment.

"To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence; but it has never occurred to one of them, nor would it occur to any rational man, that they are guilty of an

offence which endangers life. Unhappily one of these hundreds attempts to take the purse of a gentleman who has a loaded pistol in his pocket. The thief touches the trigger, the pistol goes off, the gentleman is shot dead. To treat the case of this pick-pocket differently from that of the numerous pick-pockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death; to send them to the house of correction as thieves, and him to the gallows as a murderer, appears to us an unreasonable course. If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged. The more nearly the amount of punishment can be reduced to a certainty the better; but if chance is to be admitted, there are better ways of admitting it. It would be a less capricious, and therefore a more salutary course, to provide that every fiftieth or every hundredth thief selected by lot should be hanged, than to provide that every thief should be hanged who, while engaged in stealing, should meet with an unforeseen misfortune, such as might have befallen the most virtuous man while performing the most virtuous action."

can we justify the conviction when this intent is confessedly wanting, and this in the teeth of the ordinary presumption of innocence, and of the fact that in most cases of this class, not only was the defendant innocent of an intent to kill, but the mere possibility of killing, could he have contemplated it, would have caused him to desist from the felony?

§ 59. The old English reasoning was something like this:—

Whenever all offences of a particular class are punished in the same way, it is a matter of indifference to an offender as to which he is convicted of committing. When he has a “felonious intent,” and when executing this intent he commits a felony, though a different felony from that intended, then the “felonious intent” may be tacked to the unintended felony.

Of course, there is a fallacy in this. The defendant, supposing him to be intending to steal, has not a general felonious intent, but simply an intent to do a particular thing which is utterly distinct from the killing of a human being. Supposing that in unlawfully shooting a chicken the chicken’s owner is accidentally shot, no doubt this is manslaughter, for the use of fire-arms in such a way is negligence which makes the party using them responsible for negligent homicide. The correct course, under such circumstances, would be to indict the offender for the larceny of the chicken, and for manslaughter of the chicken’s owner. That this course was not, in the old law, pursued, may be attributed in a large measure to the fact that the stealing a chicken was as much a capital offence as was murdering a man. Indeed, Chief Justice Fortescue, when exhibiting the superiority of the English over the Roman law, seized upon this very illustration. Crime was repressed, so he leaves us to infer, because criminals of all grades were exterminated.

§ 60. But this reason, such as it is, no longer exists. Larceny and murder have assigned to them distinct punishments; and it is no longer a matter of indifference to the defendant for which he is to be tried. Nor is it a matter of indifference to juries. A jury must feel itself far more willing to convict a man of larceny than to convict him of murder simply because he intended to kill a tame fowl. Of course this assumes that the killing of the owner of the fowl was purely accidental, and that so far from it being intended, it was an act against the offender’s will. If so, a jury will revolt at conviction; and the testimony of the judges

examined by the English Homicide Amendment Committee shows that rather than permit such a conviction, judges who persist in holding the old rule "contrive" to find for the jury some collateral excuse for acquittal.

§ 61. If juries are unwilling to convict of murder on such evidence, a lawyer must have still greater difficulty in framing an argument by which such a conviction could be reasonably sustained. To murder, an intent to kill or grievously hurt is essential. No man can be convicted, especially of a capital offence, when the offence was one he did not intend to commit. That a man cannot be convicted of one offence because he intended to commit another is an acknowledged principle, — a principle only modified in cases where the latter offence includes the former. No man who, *bonâ fide*, and without negligence, swears to a mistake, can be convicted of perjury, because in the same suit he intends to perjure himself in another matter, but does not. No man can be convicted of burglary in entering his own house because he intended to steal somebody else's property in such house. If the intent, even as to offences of a similar grade, cannot thus be transferred, we certainly cannot do this when one offence is capital and the other non-capital. Nor can we do so without violating the established rules of pleading. An indictment for murder is bad unless it avers an intent to kill, or grievously hurt. Certainly this is an averment which must be proved.

§ 62. We cannot, on principle, answer an argument such as this. Of course, when a legislature enacts that an unintentional homicide, which occurs in the perpetration of a collateral felony, shall be called murder, we have to accept the definition.

§ 63. But wherever the question is still open, the true course, when a homicide negligently takes place in the attempt to commit a felony, is to indict the defendant for an attempt to commit the felony, in one indictment, and for manslaughter in another indictment. Two offences have been committed by him. He must be indicted for them separately.<sup>1</sup> A part of one cannot be broken off from one and joined to a part broken off from the other, so as to make a new offence. No such new offence can be constituted; for intending to do one thing and then doing another cannot make up one intentional crime. But the negligent homi-

<sup>1</sup> Whart. Cr. Law, § 382.

cide, which is manslaughter, may be properly prosecuted in one indictment, and the attempt to commit the felony in another. To join these in one indictment is not permissible; and *a fortiori* it is not permissible to join pieces of the two so as to make up one offence.

#### V. INTENT TO COMMIT COLLATERAL MISDEMEANOR.

§ 64. *Accidental homicide incident to an unlawful act is manslaughter.* — None of the difficulties which beset the last topic attend that which we are now about to notice. Manslaughter necessarily excludes the hypothesis of deliberate malicious killing, and includes all cases where killing takes place in execution of an unlawful design, not involving such deliberate malicious intent to kill. We may therefore properly hold that where a homicide is unintentionally committed when in the performance of an unlawful act, the offence is manslaughter. Under this head the following cases may be noticed:—

§ 65. *Assaults.* — Death unintentionally happening from a mere assault is manslaughter. Thus, where the defendant struck A.'s horse, which started and killed B., the defendant was correctly held liable for the manslaughter of B.<sup>1</sup> So where the defendant, having a right to the possession of a gun, which gun he knew to be loaded, attempted to snatch the gun from the hands of the deceased, and during the process the gun was discharged and killed the deceased, this was held manslaughter, and rightfully, for to seize property violently from another is an unlawful act.<sup>2</sup>

§ 66. *Production of abortion.* — Supposing this is done in a way not to inflict serious injury on the mother, and the mother dies from negligence in the operation, there being no intent to kill, or to inflict serious injury, and no likelihood of such result, the offence, on the reasoning above given, is but manslaughter. It is otherwise when the intent is to seriously injure the mother, or the act is likely seriously to injure her. In this case her killing is murder.<sup>3</sup>

§ 67. *Riots.* — Homicide in riots, when there is no intent to

<sup>1</sup> *Plummer's case*, 1 Hale, 475; 1 Hawk. c. 29, s. 11; c. 31, s. 41.

<sup>2</sup> *R. v. Archer*, 1 F. & F. 351.

<sup>3</sup> See *supra*, § 41; *infra*, § 192, 317.

kill, or to inflict serious bodily harm, is in like manner manslaughter.<sup>1</sup>

§ 68. *Illicit sexual intercourse.* — So also a man who, in order to have sexual intercourse with a girl, used artificial means, with her consent, to make such intercourse practicable, in consequence of which she died, was held guilty of manslaughter.<sup>2</sup>

<sup>1</sup> See *infra*, § 200.

<sup>2</sup> *State v. Center*, 35 Vt. 378. See *supra*, § 40, 41.



## CHAPTER IV.

### NEGLIGENT HOMICIDE.

#### I. OMISSIONS, § 72.

Not indictable unless constituting defect in duty, § 72.

Omission to perform act of mercy not indictable, § 73.

Otherwise as to party charged with exclusive duty,—parents, masters, &c., § 74.

Husband and wife, § 75.

Keepers, jailers, &c., § 76.

Incapacity a defence, § 77.

Capacity of neglected person a defence, § 78.

Conscientious mistake a defence, § 79.

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Omissions to give warning of danger, § 81.

#### II. GENERAL CONSIDERATIONS AS TO NEGLIGENCE, § 82.

Must have been no discretion as to act, § 82.

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Not necessary that negligence should have been in violation of a contract, § 84.

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#### III. DANGEROUS AGENCIES, § 87.

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(Spring guns. See § 418.)

#### IV. OFFICERS OF RAILROADS, § 94.

#### V. PERSONS DROPPING ARTICLES ON A THOROUGHFARE, § 99.

#### VI. OFFICERS OF STEAM-VESSELS, § 100.

#### VII. PERSONS DRIVING OR RIDING, § 107.

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#### VIII. NOXIOUS ANIMALS, § 125.

#### IX. PERSONS HAVING CHARGE OF CHILDREN OR OTHER DEPENDENTS, § 126.

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#### X. MEDICAL MEN, § 141.

For such to omit customary care is negligence, § 141.

Must be competent according to school, § 142.

Not responsible for honest mistakes usual to good practitioners, § 143.

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No difference between licensed and unlicensed practitioners, § 145.

Competent skill required irrespective of license, § 151.

Careless or ignorant use of dangerous instrument is negligence, § 152.

No difference between volunteer and feed physician, § 153.

Apothecaries and chemists liable on same principle, § 154.

**XI. PERSONS RUNNING DANGEROUS MACHINERY, § 155.**

Care must be proportioned to danger, § 155.

Careless ventilation of mine, § 159.  
Deserting post, § 160.

**XII. PRIZE-FIGHTERS AND PERSONS ENGAGED IN ATHLETIC SPORTS, § 161.**

Prize-fighters liable for manslaughter in non-malicious killing of antagonist, § 161.

And so of participants in unlawful sports, § 162.

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In practical jokes, responsibility attaches, § 164.

**XIII. CORRECTION BY PERSONS IN AUTHORITY, § 165.**

Killing by immoderate correction is manslaughter, § 166.

**I. OMISSIONS.**

§ 72. *Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested.*<sup>1</sup> There is no such thing, in fact, as an omission that can be treated as an absolute blank. A man who is apparently inactive is actually doing something, even though that something is the cancelling of something else that he ought to have done. Even sleeping is an affirmative act, and may become the object of penal prosecution when it operates to interrupt an act on the part of the defendant which the law requires of him with the penalty of prosecution for his disobedience. As, therefore, an omission takes its character from the prior responsibility that it suspends, that responsibility must be scrutinized when we undertake to estimate the penal character of an omission to perform it. And as a general rule in this respect we may say, that *when a responsibility exclusively imposed on the defendant is such that an omission in its performance is, in the usual course of events, causally followed by an injury to another person or to the state, then the defendant is indictable for such an omission.*<sup>2</sup>

<sup>1</sup> *R. v. Gray*, 4 F. & F. 1098; *infra*, § 361.

<sup>2</sup> See *R. v. Hughes*, D. & B. C. C. 248; 7 Cox C. C. 301; *R. v. Haines*, 2 C. & K. 368; *R. v. Lowe*, 3 C. & K. 123; 4 Cox C. C. 449.

Lord Macaulay, in his Report on the India Penal Code, thus discusses the question in the text:—

“Two things we take to be evident: first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omis-

sions ought not to be punished. It will hardly be disputed that a jailer who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant intrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be

§ 73. *Omission to perform acts of mercy not indictable.* —As in conformity with the definition just stated, the responsibility must

the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die. It is difficult to say whether a penal code which should put no omissions on the same footing with acts, or a penal code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

"It is plain, therefore, that a middle course must be taken; but it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn, it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include.

"Mr. Livingston's Code provides that a person shall be considered guilty of homicide who omits to save life, which he could save 'without personal danger or pecuniary loss.' This rule appears to us to be open to serious objection. There may be extreme inconvenience without the smallest personal danger, or the smallest

risk of pecuniary loss, as in the case which we lately put of a surgeon summoned from Calcutta to Meerut to perform an operation. He may be offered such a fee that he would be a gainer by going. He may have no ground to apprehend that he should run any greater personal risk by journeying to the Upper Provinces than by continuing to reside in Bengal. But he is about to proceed to Europe immediately, or he expects some members of his family by the next ship, and wishes to be at the Presidency to receive them. He, therefore, refuses to go. Surely he ought not, for so refusing, to be treated as a murderer. It would be somewhat inconsistent to punish one man for not staying three months in India to save the life of another, and to leave wholly unpunished a man who, enjoying ample wealth, should refuse to disburse an anna to save the life of another. Again, it appears to us that it may be fit to punish a person as a murderer for causing death by omitting an act which cannot be performed without personal danger or pecuniary loss. A parent may be unable to procure food for an infant without money. Yet the parent, if he has the means, is bound to furnish the infant with food, and if, by omitting to do so, he voluntarily causes its death, he may, with propriety, be treated as a murderer. A nurse, hired to attend a person suffering from an infectious disease, cannot perform her duty without running some risk of infection. Yet if she deserts the sick person, and thus voluntarily causes his death, we should be disposed to treat her as a murderer. We pronounce with confidence, therefore, that the line ought not to be drawn where Mr. Livingston

be one exclusively assumed by the defendant, the omission to perform acts of mercy, even though death to another result from

has drawn it. But it is with great diffidence that we bring forward our own proposition. It is open to objections; cases may be put in which it will operate too severely, and cases in which it will operate too leniently; but we are unable to devise a better.

"What we propose is this: that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner, provided that such omissions were, on other grounds, illegal. An omission is illegal (see clause 28) if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

"We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A. omits to give Z. food, and by that omission voluntarily causes Z.'s death. Is this murder? Under our rule it is murder if A. was Z.'s jailer, directed by the law to furnish Z. with food. It is murder if Z. was the infant child of A., and had therefore a legal right to sustenance, which right a civil court would enforce against A. It is murder if Z. was a bedridden individual invalid, and A. a nurse hired to feed Z. It is murder if A. was detaining Z. in unlawful confinement, and had thus contracted (see clause 338) a legal obligation to furnish Z., during the continuance of the confinement, with necessaries. It is not murder if Z. is a beggar, who has no other claim on A. than that of humanity.

"A. omits to tell Z. that a river is swollen so high that Z. cannot safely attempt to ford it, and by this omission voluntarily causes Z.'s death. This is murder, if A. is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A. is a guide who had contracted to conduct Z. It is not murder if A. is a person on whom Z. has no other claim than that of humanity. A savage dog fastens on Z. A. omits to call off the dog, knowing that if the dog be not called off, it is likely that Z. will be killed. Z. is killed. This is murder in A., if the dog belonged to A., inasmuch as his omission to take proper order with the dog is illegal. Clause 273. But if A. be a mere passer-by, it is not murder.

"We are sensible that in some of the cases which we have put, our rule may appear too lenient; but we do not think that it can be made more severe without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow-creature to die of hunger at his feet, is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man, who refuses to save a beggar's life at the cost of a little copper, is a murderer, is the poor man, just one degree above beggary, also to be a murderer if he omits to invite the beggar to partake his hard-earned rice? Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose

such omission, is not within the rule. One man, for instance, may see another starving, and may be able, without the least inconvenience to himself, to bring food to the sufferer, and thus save the latter's life; but the omission to do this is not indictable, unless there be an exclusive responsibility to this effect imposed

A. to be fully convinced that nothing can save Z.'s life unless Z. leave Bengal and reside a year at the Cape; is A., however wealthy he may be, to be punished as a murderer because he will not, at his own expense, send Z. to the Cape? Surely not. Yet it will be difficult to say on what principle we can punish A. for not spending an anna to save Z.'s life, and leave him unpunished for not spending a thousand rupees to save Z.'s life. The distinction between a legal and an illegal omission is perfectly plain and intelligible; but the distinction between a large and a small sum of money is very far from being so, not to say that a sum which is small to one man is large to another. The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man, where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveller against a swollen river? Is he to be a murderer if he does not go a hundred yards? If he does not go a mile? — if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between the guide who is bound to conduct the traveller as safely as he can and a mere stranger is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life, and a stranger

who will not run a mile to save a man's life, is very far from being equally clear.

"It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbors, but should render active service to their neighbors. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation. Now, no circumstance appears to us so well fitted to be the mark as the circumstance which we have selected. It will generally be found in the most atrocious cases of omission; it will scarcely ever be found in a venial case of omission; and it is more clear and certain than any other mark that has occurred to us. That there are objections to the line which we propose to draw, we have admitted. But there are objections to every line which can be drawn, and some line must be drawn."

on the defendant. Thus it has been even ruled that where the defendant permits an idiot brother, residing in his house, to die from want of food, the defendant, the case standing on this evidence alone, is not penally responsible, he not having undertaken the exclusive support of the deceased;<sup>1</sup> and the same reasoning has been applied to a mother who neglects to supply the wants of a lunatic illegitimate child.<sup>2</sup> But the law would be otherwise if it should appear that the defendant, no matter what was his relation to the deceased, had so secluded the deceased that he could be relieved by no one else.<sup>3</sup>

§ 74. *Otherwise as to party charged with exclusive duty. Parents, master, &c.* — It is by appealing to this distinction that we are able to support the decisions making the father or the master penally responsible for omission to supply food and clothing to child or apprentice;<sup>4</sup> but holding that the mother, unless she assumes such exclusive charge, is not so responsible.<sup>5</sup> Thus, where an unmarried woman, eighteen years of age, who usually supported herself by her own labor, being about to be confined, returned to the house of her stepfather and her mother. She was taken in labor (the stepfather being absent at his work), and in consequence of the mother's neglect to use ordinary diligence in procuring the assistance of a midwife, the daughter died in her confinement. There was no proof that the mother had any means of paying for the services of a midwife. It was held that no legal duty was cast upon the mother to procure a midwife, and therefore that she could not be convicted of the manslaughter of her daughter.<sup>6</sup>

It should be remembered that when food is wilfully withheld

<sup>1</sup> *R. v. Smith*, 2 C. & P. 449. It is otherwise if the control be exclusive. *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449. See *infra*, § 324. See also *State v. Preslar*, 3 Jones N. C. 421.

<sup>2</sup> *R. v. Pelham*, 8 Q. B. 959.

<sup>3</sup> *R. v. Smith*, L. & C. 607; 10 Cox C. C. 82; *Whart. C. L.* § 2529.

<sup>4</sup> *R. v. Waters*, T. & M. 57; 1 Den. C. C. 366; *R. v. Edwards*, 8 C. & P. 611; *R. v. Middleship*, 5 Cox C. C. 275; *R. v. Squire*, 1 Russ. on Cr.

621; *R. v. Lowe*, 4 Cox C. C. 449; 3 C. & K. 123; 1 Ben. & H. Lead. Ca. 49; *State v. Hoit*, 3 Foster, 355; *R. v. Ryland*, L. R. 1 C. C. 99; 10 Cox C. C. 569; *Whart. Cr. L.* 7th ed. § 2508.

<sup>5</sup> *R. v. Saunders*, 7 C. & P. 277; *R. v. Edwards*, 8 C. & P. 611; *R. v. Shepherd*, 9 Cox C. C. 123; L. & C. 147; *infra*, § 133 *et seq.*

<sup>6</sup> *R. v. Shepherd*, 9 Cox C. C. 123; L. & C. 147; *infra*, § 134.

from a helpless person, under the defendant's exclusive charge, with the intention to kill, the offence is murder.<sup>1</sup>

§ 75. *Husband and wife.*—So is a husband responsible for his wife's death caused by her want of necessities; though to support such an indictment it should appear that the wife was in such a helpless state as to be unable to appeal elsewhere for aid, and that the death was the natural and regular and likely consequence of the husband's withdrawal of aid.<sup>2</sup>

§ 76. *Keepers, jailers, &c.*—So also the keeper of an asylum or prison, who undertakes, to the exclusion of others, to feed a sick pauper, or lunatic, or prisoner, is penally responsible for the death of such pauper, lunatic, or prisoner naturally resulting from the defendant's neglect.<sup>3</sup>

§ 77. *Incapacity a defence.*—In cases, however, where the party charged is unable to supply the necessary succor, he ceases to be responsible.<sup>4</sup> But this responsibility is not divested, in countries where poor-houses exist, by poverty; for in such cases the person owing the duty is bound to report the case to the public authorities for their relief.<sup>5</sup> And in an indictment against a parent for neglecting to provide sufficient food and clothing for a child of tender years, for whom he is bound by law to provide, it is not necessary to aver that the parent was, at the time of the alleged offence, of sufficient ability to perform the duty so imposed upon him.<sup>6</sup>

§ 78. *So also responsibility ceases where the person neglected is capable of caring for himself.*—Thus a parent is not indictable for the death by starvation of a child competent to assist

<sup>1</sup> R. v. Conde, 10 Cox C. C. 547; R. v. Bubh, 4 Cox C. C. 455; *infra*, § 134.

<sup>2</sup> *Infra*, § 133; R. v. Plummer, 1 C. & K. 600; State v. Preslar, 3 Jones Law (N. C.), 421; Whart. Cr. L. 7th ed. § 2508.

<sup>3</sup> *Infra*, § 140. See R. v. Huggins, 2 Stra. 882; 2 Ld. Ray. 1574; R. v. Treeve, 2 East P. C. 821; R. v. Barrett, 2 C. & K. 343; R. v. Porter, L. & C. 394; 9 Cox C. C. 449; R. v. Pelham, 8 Q. B. 959; 1 W. & S. Med. Jur. § 242; Whart. C. L. 7th ed. § 2530.

<sup>4</sup> R. v. Hogan, 5 Eng. L. & E. 553; 2 Den. C. C. 277; 5 Cox C. C. 255; Saunders's case, 7 C. & P. 277; R. v. Phillpot, 20 Eng. L. & E. 591; 6 Cox C. C. 140; R. v. Vann, 8 Eng. L. & E. 596; 2 Den. C. C. 325. See *infra*, § 134-140.

<sup>5</sup> R. v. Mabbett, 5 Cox C. C. 339; though see R. v. Shepherd, Leigh & C. 147; 9 Cox C. C. 123. See *infra*, § 134.

<sup>6</sup> R. v. Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569.

itself, unless the parent in some way shut the child off from obtaining assistance;<sup>1</sup> nor a master in such cases for the death of a servant.<sup>2</sup>

§ 79. *So also where the omission is the result of a conscientious error of judgment.*—This exception has to be closely guarded, for when the omission is to obey a positive order (*e. g.* that to adjust a switch), conscientious error of judgment is no defence. The law in such respects exacts explicit obedience. With those, however, charged with the care of children and dependents, when the mode in which the duty is to be performed is left to the conscientious judgment of the party in charge, then this judgment may be appealed to in defence. Thus, when from a conscientious conviction that God would heal the sick, and not from any intention to avoid the performance of their duty, the parents of a sick child refuse to call in medical assistance, though well able to do so, and the child consequently dies, it was held not culpable homicide.<sup>3</sup>

§ 80. *Omissions by those charged with machinery, ships, railways, &c.*—Here again are to be put the questions: Was the defendant exclusively charged with a particular office? Did injury to another ensue as a regular and usual consequence from his omission? If so, the defendant is to be held penally responsible.<sup>4</sup> Hence such responsibility has been held to attach where an engineer leaves a steam-engine in charge of an incompetent person;<sup>5</sup> where the officers of a vessel omit to keep a proper lookout;<sup>6</sup> where a pilot omits to make himself properly understood by a foreign helmsman;<sup>7</sup> where the officer in charge omits to ventilate a mine;<sup>8</sup> where a railway tender omits to give the

<sup>1</sup> *R. v. Waters*, T. & M. 57; 1 Den. C. C. 356; 2 C. & K. 864.

<sup>2</sup> *Anon.* 5 Cox C. C. 279; *R. v. Smith*, 8 C. & P. 153; *R. v. Smith*, L. & C. 607; 10 Cox C. C. 82; *infra*, § 134; though see *R. v. Ridley*, 2 Camp. 650.

<sup>3</sup> *R. v. Wagstaffe*, 10 Cox C. C. 530; Whart. Cr. L. 7th ed. § 82; *R. v. Hines*, cited *infra*, § 131.

<sup>4</sup> *R. v. Hughes*, D. & B. C. C. 248; *R. v. Haines*, 2 C. & K. 368; *R. v. Lowe*, 3 C. & K. 123; 4 Cox C. C. 449.

<sup>5</sup> *Infra*, § 385; *R. v. Lowe*, 4 Cox C. C. 449; but merely to leave a machine at rest does not *per se* confer responsibility. *Hilton's case*, 2 Lewin, 214.

<sup>6</sup> *R. v. Lowe*, 4 Cox C. C. 449; 3 C. & K. 123; *R. v. Spence*, 1 Cox C. C. 352; correcting *R. v. Allen*, 7 C. & P. 153; and *R. v. Green*, *Ibid.* 156.

<sup>7</sup> *R. v. Spence*, 1 Cox, 352.

<sup>8</sup> *R. v. Haines*, 2 C. & K. 368; *infra*, § 139.



proper signal;<sup>1</sup> where an iron-founder, instead of re-casting a piece that had burst, fills up the crevice with lead;<sup>2</sup> where a mechanic, employed for the purpose in a colliery, omits to plank up a shaft;<sup>3</sup> where a switch-tender omits properly to turn a switch;<sup>4</sup> and where a conductor of a street car, whose duty it is to look out and to stop the car if it is likely to do damage, neglects to keep a proper lookout.<sup>5</sup> But as has been seen *the responsibility of the defendant, which he thus fails to discharge, must be exclusive and peremptory.*<sup>6</sup> A stranger who sees that unless a railway switch is turned or the car stopped, an accident may ensue, is not indictable for not turning the switch or stopping the car. The reason for this is obvious. To coerce, by criminal prosecutions, every person to supervise all other persons and things, would destroy that division of labor and responsibility by which alone business can be safely conducted, and would establish an industrial communism by which private enterprise and private caution would be extinguished. Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passer-by were compelled by the terror of a criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed.

§ 81. *Omission in giving warning of danger.* — The test here is, is such notice part of an express duty with which the defendant is exclusively charged? If so, he is responsible for injury which is the regular and natural result of his omission; but if not so bound, he is not so responsible.<sup>7</sup> A man, for instance, working with snow or shingles on a roof, may throw such snow or shingles on a street if he give proper notice to the passers-by, and he is indictable for injury accruing from failure to give notice.<sup>8</sup> The reason is that, from the very nature of the work

<sup>1</sup> R. v. Pargeter, 3 Cox C. C. 191.

<sup>2</sup> R. v. Gray, 4 F. & F. 1098; R. v.

<sup>3</sup> R. v. Carr, 8 C. & P. 163; *infra*, Barrett, 2 C. & K. 343.

§ 135.

<sup>7</sup> R. v. Smith, 11 Cox C. C. 210.

<sup>8</sup> R. v. Hughes, 7 Cox C. C. 301.

See Lord Macaulay's views on this point in note to § 72.

<sup>4</sup> State v. O'Brien, 3 Vroom, 169; *infra*, § 158.

<sup>5</sup> Archbold's C. P. 9th ed. 9; 3 Inst.

<sup>6</sup> Com. v. Metr. R. R. 107 Mass. 236.

70; Foster, 263. So also the case in Pauli Rec. Sent. V. 23, § 12. "Si

in which he is engaged, such warning can only be accurately given by himself. A stranger, on the other hand, who sees the snow or timber about to fall, is not so indictable, because on him rests no exclusive responsibility. By the same process may we solve other questions which not unfrequently arise. A railway subaltern neglects to give the proper signal, and a collision results; and here, if the subaltern in question was specially and exclusively charged with the duty of signalling, he is criminally responsible; otherwise not.<sup>1</sup> A light-house keeper permits his light to go out, and a vessel is consequently wrecked. Is he penally responsible? Certainly so, if he is exclusively charged with the office of light-house keeper at that point, and if this is the kind of light on which seamen exclusively depend for guidance. But supposing a number of persons undertake, in order to warn vessels, to keep lights in their windows, the omission of one of these persons to light his windows, from which serious mischief ensues, would not be indictable.

So with regard to fire alarms.<sup>2</sup> We can conceive of a popu-

*putator ex arbore, cum ramum dejiceret, non proclamaverit, ut vitaretur, atque ita praeteriens ejusdem ictu homo perierit, etsi in legem non incurrit, in metallum damnatur."*

<sup>1</sup> R. v. Pargeter, 3 Cox C. C. 191; R. v. Spence, 1 Cox C. C. 352; R. v. Bengé, 4 F. & F. 504; Whart. Cr. L. 7th ed. § 2529; and see *infra*, § 94, 95.

<sup>2</sup> "A fire watchman, or tower watchman," says Bar, in his very able treatise on this topic (*Die Lehre vom Causalzusammenhange*, 1871, p. 104), "whose duty it is to watch for fires at their beginning, and to give notice of them to the authorities, should he omit (without the intention of aiding the fire) to give such notice, is not penally responsible for the omission. The reason for this is not to be found, as has been argued, in the *universality* of the duty of the watchman, although it is true that one who is appointed to watch a particular fire is criminally responsible, if,

through his neglect, the fire is communicated to the property of another. But the true reason for the non-responsibility of the watchman in the case first mentioned is to be found in the fact that, on the one side, the cessation of the fire is not a regular effect (*regelmässige Folge*) of the watchman's vigilance, and on the other hand, the extension of the fire is not a regular effect of his inactivity." This may be blended with the reason in the text, that responsibility only exists for non-vigilance in parties whose office in this respect is one that excludes the interference of others. Were it otherwise, every watchman in a city would be found guilty of every fire that took place. It would be impossible for him to deny that, had he been on the spot, he might have extinguished the fire at its first spark. As, however, the law cannot exact such universal responsibility, it must draw a line of restriction. And the safest line we can take is that

lation so exclusively dependent on a particular fire alarm, that the non-sounding of such an alarm might be treated as the juridical cause of the spreading of a fire. But this is not ordinarily the case, a fire alarm being one of many modes of communicating the fact that a fire exists. So with regard to anticipated wrong by third parties. Certain functionaries exist who are exclusively charged with the issuing of warrants for the arrest of persons from whom wrong may be expected; and if these functionaries neglect to do their duty, they are indictable. Private individuals may intervene in the first instance, as prosecutors, but they are not forced to do so by law, and no private person is punished by criminal prosecution for not criminally prosecuting another. The reason, to ascend to the general principle, is this: no one unless exclusively charged with the office of giving notice of danger is indictable for failure to give notice, because: (1.) such failure, while it may be the *condition*, is not the juridical cause of the subsequent injury; and because, (2.) were default in making such warnings punished penally in private individuals every person would be compelled by law to devote himself to watching all other persons and things.

## II. GENERAL CONSIDERATIONS AS TO NEGLIGENCE.

§ 82. *There must be no discretion in the discharge of the duty.*—Hence trustees having power to repair roads are not criminally responsible for the death of a person resulting from an omission on their part to repair.<sup>1</sup>

§ 83. *There must be a causal connection between the omission and the injury.*—The distinction in this respect between a *condition* and a *cause* will be hereafter discussed.<sup>2</sup> A condition is a prior act without which a subsequent act cannot exist. A. sells to B. an explosive oil, which afterwards, from omission on B.'s part to take due care, explodes. The sale from A. to B. is a condition of the subsequent explosion, but A. is not the cause of the explosion, if it be shown that the oil when sold was in the

given in the text: that when a man is charged, to the exclusion of all others, with watching and giving notice of danger at a particular spot, he is penally responsible for a failure to give notice, from which injury regularly

flows. If not so exclusively charged, he is not responsible.

<sup>1</sup> R. v. Pocock, 17 Q. B. 34; 5 Cox C. C. 172.

<sup>2</sup> See infra, § 358; and see also R. v. Pelham, 8 Q. B. 959.

condition in which oils of the same class are regularly brought to market. On the other hand, if the oil was not in such condition, but was of such a character that it would explode unless precautions unusual and unnecessary in regular business were undertaken by the purchaser; then A. by his misconduct in selling the oil in such a state is the cause of the explosion, and is penally responsible for its results. So the city of B. distributes unwholesome water which it obtains from C. under a contract made with the latter. C. is the *condition* of the distribution, but he is not the *cause*, unless the water which he supplied the city was unwholesome at the time of the supply.<sup>1</sup>

So a husband maltreats his wife, and she subsequently, when he has left her, wanders from the house and perishes in the woods. Here his maltreatment is the *condition* of his wife's death, but not its *cause*, if she leaves the house of her free will and not paralyzed by terror produced by his violence.<sup>2</sup>

§ 84. *Not necessary that negligence should be in violation of a contract, or the subject of civil suit.* — To make negligence indictable it is not necessary that it should be in violation of a contract.<sup>3</sup> Wherever the defendant fails to discharge a duty imposed on him, whether this duty be by natural law, or statute, or contract, then he is indictable for injuries thus produced, provided, as has just been seen, the duty is one with which he is exclusively charged. Civil and criminal responsibility are in this view far from being convertible. On the one hand, contracts, as a general rule, cannot be made the basis of a criminal prosecution.<sup>4</sup> On the other hand, there are many cases in which indictments lie (*e. g.* nuisance and neglect of official duty in which there is no special damage to an individual), where no civil action can be maintained. But so far as concerns homicide, we may safely say that there is no criminal responsibility where the defendant would not have been civilly liable at the suit of the party injured, had he survived the injury.<sup>5</sup>

§ 85. *Master answerable for servant's negligence.* — This sub-

<sup>1</sup> Stein v. State, 37 Alab. 123; infra, § 360.

<sup>2</sup> State v. Preslar, 3 Jones N. C. 421; infra, § 366.

<sup>3</sup> Wh. C. L. § 1003.

<sup>4</sup> R. v. Daniel, 6 Mod. 99; R. v. Wheatley, 1 W. Bl. 273; Com. v. Hearsay, 1 Mass. 337.

<sup>5</sup> See remarks of Willes, J., in R. v. Birchall, 4 F. & F. 1087.

ject will be hereafter independently discussed.<sup>1</sup> One or two points bearing on negligence may be here noticed. A master is presumed to be one with the servant so far as concerns the latter's conduct in the ordinary working of the master's business; for the master's duty is in all respects to supervise the servant so as to keep the servant from invading the rights of others; and the servant's failure in this respect is the master's failure. For in all that relates to the management of the master's business the servant is to be regarded as the master's instrument; and as the master is responsible for the defective or mischievous action of his machine, so is he responsible for the defective or mischievous action of his servant. When, however, the servant leaves the orbit prescribed by his master and engages in business on his own account, then the master's responsibility ceases. We here fall back on the principle elsewhere invoked, that there must be a direct causal connection between the defendant's malfeasance or nonfeasance and the injury. The interposition of a human will acting independently of the defendant and in an eccentric orbit, or the interposition of some extraordinary natural phenomenon, breaks this causal connection.<sup>2</sup>

§ 86. *No defence that business was lawful.* — Nor is it any defence that the defendant's business was lawful. If he acts negligently, and from his negligence, as a natural, usual, and likely result, death follows, it is undoubtedly manslaughter.<sup>3</sup> Such also is the law with regard to manufacturers and workmen;<sup>4</sup> to persons having charge of children or dependents,<sup>5</sup> and to officers of steam and other vessels.<sup>6</sup>

### III. DANGEROUS AGENCIES.<sup>7</sup>

§ 87. *Negligent use of such involves responsibility.* — Whoever possesses a dangerous agent must take such care of it as good

<sup>1</sup> See *infra*, § 325 *et seq.* Wh. Cr. Metc. 259; *Com. v. Morgan*, 107 Mass. L. § 153; *Com. v. Metrop. R. R.* 107 199.

Mass. 236, — a case under a special statute making corporations indictable for negligence of servants. And see *R. v. Medley*, 6 C. & P. 292; Wh. Cr. L. § 2374; *R. v. Dixon*, 3 Maule & S. 11; *Turberville v. Stampe*, 1 Ld. Ray. 264; *Com. v. Nichols*, 10

<sup>2</sup> *Infra*, § 362.

<sup>3</sup> Wh. Cr. L. § 1013.

<sup>4</sup> *Infra*, § 87, 135. See *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74.

<sup>5</sup> *Infra*, § 126.

<sup>6</sup> *Infra*, § 100-107.

<sup>7</sup> Mr. Livingston, in his Report on the

business men, under such circumstances, are accustomed to apply ; and if from his neglecting to exercise such care death ensue

Louisiana Penal Code, says, this particular form of homicide "is defined as homicide involuntarily inflicted in the performance of a lawful act, in which there is no apparent risk of life, by ordinary means ; but without that care and precaution which a prudent man would take to avoid the risk of destroying human life. It will be best understood by a perusal of this division of the section. But it may here be generally comprehended by repeating one of the examples by which it is there illustrated. 'When death is casually inflicted by discharging fire-arms which are believed not to be loaded, without examining whether they are so or not, it constitutes this offence. If the examination be made, and owing to some unknown cause, although loaded, they appear to be empty ; or, if unknown to the person using them, they have been loaded immediately after the examination, due caution has been used, and there is no offence.' A very slight punishment is annexed to this offence, and I doubted long whether, as the definition assumes the absence of any intent to injure, the horror and grief naturally caused by so fatal a consequence would not, in itself, be a sufficient punishment for the negligence ; that these sensations must inflict a suffering much more severe than any the law could with justice award, cannot be questioned. But, after much hesitation, I concluded, that this consideration would not justify me in omitting to place so fatal an act of negligence in the class of offences. It would induce us totally to excuse all negligent and even many voluntary homicides. The depravity that can conquer those feelings of remorse and mental anguish, with which

nature avenges the destruction of human life, is not suddenly, easily, or frequently attained. He who, yielding to sudden passion, takes the life of an adversary who has provoked him, feels the operation of this internal engine of punishment as keenly as he does who is the negligent or even the casual instrument of a similar event. Nor is even the deliberate murderer exempt ; and the poets who have painted the most closely from nature have always truly represented the subsequent remorse to augment in proportion to the previous atrocity of the murder. Richard is haunted by the ghost of his victims. Macbeth exclaims, 'I scarce can think on what I've done ;—look on it again, I dare not ;' and the reason of his tiger-hearted instigator and accomplice reels under the weight of her remorse. Indeed, of the two, the homicide from sudden passion may reasonably be supposed to be endowed with keener sensations, and therefore more sensibly feel the pang of remorse, than he does who has shown so much indifference to the life of a human being as not to take the proper precautions for its preservation.

"Besides, the frequency of these accidents, as they are incorrectly called, seemed to demand some interposition of the law. At present they are considered and classed as excusable. But when they shall be stigmatized as offences ; when the voice of the law shall direct the exercise of that circumspection which prudence now in vain commands, it is believed that greater caution will be the result ; and instances are not wanting to show, that a positive inhibition, accompanied by the fear of a comparatively slight punishment, has prevented men from

to another, he is liable for manslaughter. Illustrations of this principle will be given in the following sections.<sup>1</sup>

incurring risks and rushing on dangers of the most serious nature." In a note, he adds that "A traveller in Prussia during the reign of Frederick has told us, that the cavalry reviews of that great disciplinarian were at one time very much embarrassed by the dragoons frequently falling from their horses, whereby many of them had their bones broken or were trampled to death. A general order made a fall punishable with thirty-nine stripes; after which it was found that their horsemanship was so much improved that falls became very rare."

<sup>1</sup> See also, *infra*, § 470, 473, 479. As civil cases, illustrating the same principle, the following may be cited: The defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; it was held, that the defendant was liable to damages in an action on the case.<sup>2</sup> So a person who sells gunpowder to a boy eight years of age, who had no knowledge or experience in its use, and who subsequently in-

juries himself by an explosion, has been held liable for the injury;<sup>3</sup> and so of a retailer of burning fluids, who sells naphtha, a dangerous and explosive fluid, without giving notice of its character, to a person ignorant of such character.<sup>4</sup> So where an inexperienced agent was left in charge of a train of cars, for the purpose of loading the cars with oil, and through his ignorance or unskilful management a collision occurred between one of the cars and the locomotive, resulting in a fire which burned plaintiff's house, the railroad company was held responsible for his acts.<sup>5</sup> A person shipping an explosive compound without notice is liable for consequences, although these result from the opening of the package by a warehouseman ignorant of its contents, who was led to open the package from the fact of its leaking.<sup>6</sup> Where the defendant caused a carboy containing nitric acid to be delivered to the plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the defendant, and the defendant did not take reasonable care to make the plaintiff aware that the acid was dangerous, but only informed him that it was an acid, and

<sup>1</sup> *Dixon v. Bell*, 5 M. & S. 198.

<sup>2</sup> *Carter v. Towne*, 98 Mass. 567. In this case a declaration that the defendant, knowing that the plaintiff, a child eight years old, had neither experience in nor knowledge of the use of gunpowder, and was an unfit person to be intrusted with it, sold and delivered gunpowder to him, and that he, in ignorance of its effects, and using that care of which he was capable, exploded it and was burned thereby, was held to set forth a good cause of action, and to which the fact that the defendant was a duly licensed seller of gunpowder is no defence.

<sup>3</sup> *Wellington v. Downer Ker. Oil Co.* 104 Mass. 64.

<sup>4</sup> *Oil Creek, &c. Co. v. Keighron*, *Legal Gazette*, January 9, 1874; *S. C. Legal Int.* January 18, 1874.

<sup>5</sup> *Barney v. Burstenbinder*, 7 Lansing, 210; *S. C.* 64 Barb. 212. See *Pierce v. Windsor*, 2 Sprague, 35; *Jeffrey v. Bigelow*, 13 Wend. 518; *Thomas v. Winchester*, 2 Seld. 397; *Boston & A. R. R. v. Shanly*, 107 Mass. 568; *Williams v. E. Ind. Co.* 3 East, 192; *Brass v. Maitland*, 6 El. & B. 470; *Farrant v. Barnes*, 11 C. B. (N. S.) 533; as to selling poison without notice; see *Norton v. Sewell*, 106 Mass. 143.

§ 88. *Negligent use of fire-arms and powder.* — Where a gentleman came to town in a chaise, and before he got out of it fired his pistols in the street, which by accident killed a woman, the offence was ruled manslaughter, the act being likely to produce danger, and manifestly improper;<sup>1</sup> and so is it manslaughter in the common law if one negligently discharge a gun in a public place or street, and kill one whom he does not see.<sup>2</sup> Where the shooting is malicious the offence is murder.<sup>3</sup>

the plaintiff was burnt and injured by reason of the carboy bursting, whilst, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart, — it was held that the defendant was liable in an action for damages for such injury.<sup>1</sup> In his judgment, Erle, C. J. says: "I am of opinion that it was the duty of the defendant, knowing the dangerous nature of the acid which was in the carboy, to take reasonable care that its dangerous nature should be communicated to all those who were about to carry it. Now it is found by the jury that he did not do so. The accident occurred, perhaps, from the explosive character of the article; but be this as it may, it seems to me that the plaintiff was employed by the defendant to carry it, and so comes within the distinction pointed out in *Langridge v. Levy*,<sup>2</sup> as the principle of that case. I rely, however, on the case of *Brass v. Maitland*,<sup>3</sup> as establishing the principle which governs the present case. There it was held by Lord Campbell, 'that while the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, the shippers undertake that they will not deliver, to be carried on the voyage, packages of goods

of a dangerous nature which those employed on behalf of the shippers may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature.' So Willes, J., says: 'I apprehend that a person, who gives a carrier goods of a dangerous character to carry, which require more caution in their carriage than ordinary merchandise, as without such caution they would be likely to injure the carrier and his servants, is bound in law to give notice of the dangerous character of such goods to the carrier, and that if he does not do so he is liable for the consequence of such omission.' " One "who has in his possession a dangerous article that he desires to send to another may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provisions against the danger." <sup>4</sup>

<sup>1</sup> *Burton's case*, 1 Stra. 481. See also *State v. Vance*, 17 Iowa, 138.

<sup>2</sup> *People v. Fuller*, 2 Parker C. R. (N. Y.) 16; *Sparks v. Com.* 3 Bush, 111; *State v. Vance*, 17 Iowa, 138.

<sup>3</sup> See *infra*, § 477; *Gallihier v. Com.* 2 Duvall (Ky.), 163.

<sup>1</sup> *Farrant v. Barnes*, 11 Com. B. 553; 31 L. J. C. P. 137.

<sup>2</sup> 4 Mee. & Wel. 337; 7 L. J. Ex. 387.

<sup>3</sup> 6 Ell. & Bla. 470; 36 L. T. Q. B. 49.

<sup>4</sup> *Chapman, C. J.*, Bost. & A. R. R. v.

*Carney*, 107 Mass. 676, citing *Williams v. East I. Co.* 3 East, 192; *Brass v. Maitland*, 6 E. & B. 470; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Parrott v. Wells*, 15 Wall. 524.



A hunter shooting in a wilderness is not bound to the caution required of a person shooting in a populous neighborhood,<sup>1</sup> or of a military officer who, when training his men, negligently shoots one of their number;<sup>2</sup> though in the latter case it must be remembered that as the use of fire-arms is lawful, and the men take upon them all the risks incident to their employment, the burden on the plaintiff is to prove negligence.<sup>3</sup> But when the firing is unlawful, or when, being lawful, it is negligent, then it brings liability for the consequences,<sup>4</sup> including injuries caused by fright.<sup>5</sup> And as loaded fire-arms are dangerous weapons, it is negligence to place them in the hands of persons incompetent to use them.<sup>6</sup>

§ 89. Where deer had entered a corn-field, and were beating down the corn, the owner went with his servant to watch at night with a gun, and charged him to fire when he heard anything rush into the standing corn; and upon the owner rushing into the corn in another part of the field, the servant fired and killed him. In the first passage wherein Lord Hale mentions this case, he seems to think that it amounted to manslaughter, for want of due diligence and care in the servant in shooting upon such a token as might befall a man as well as a deer: however, he says, it was a question of great difficulty. But in a subsequent part of his work, as is noticed by Mr. East, the learned author relating the same case, which had been determined by himself at Peterborough, says, that he had ruled it only to be misadventure; for the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. But it seemed to him that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter; because of the want of due caution in the servant to shoot before he discovered his mark. So in the case above cited, where a gentleman on alighting from a chaise fired his pistols in the street, which, by accident, killed a woman, it

<sup>1</sup> Bissell v. Booker, 16 Ark. 303.

<sup>2</sup> Castle v. Duryea, 42 Barb. 480;  
<sup>3</sup> Keyes, 169.

<sup>4</sup> See R. v. Hutchinson, 9 Cox C. C. 555; and comments in 3 Russell Cr. & M. 660.

<sup>5</sup> R. v. Archer, 1 F. & F. 351; a case of unlawful snatching of a loaded gun, when it accidentally went off.

<sup>6</sup> Whart. on Neg. § 836. See Haack v. Fearing, 5 Robertson, 528.

<sup>7</sup> Whart. on Neg. § 92, 853.

was ruled manslaughter ; for the act was likely to breed danger, and manifestly improper.<sup>1</sup>

§ 90. Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent ; and therefore if a bystander be killed by the shot, such killing will be manslaughter.<sup>2</sup>

It has, however, been held that a person who unlawfully keeps powder in his house is not responsible for mischief caused by negligent meddling with it by his servants.<sup>3</sup>

§ 91. *Negligent exposure of poison.* — Whoever negligently exposes poison in such a way that as an ordinary consequence it produces death, is guilty of manslaughter ;<sup>4</sup> though as has been already seen, his penal responsibility ceases if the poison was taken through the negligence of the deceased, or of that of an independent responsible third person.<sup>5</sup>

§ 92. So he who administers poison negligently to another, causing death, is guilty of manslaughter ; and it is sufficient to establish negligence in this respect that he ought to have known the pernicious character of the drug he administered. *Cui facile est scire, ei detrimento esse debet ignorantia sua.*<sup>6</sup> This principle has been frequently recognized in our criminal jurisprudence.<sup>7</sup> Thus, it is manslaughter in a nurse to produce the death of a child by negligently administering to it laudanum with the intention of quieting it ;<sup>8</sup> and for an apothecary negligently to label " laudanum " as " paregoric," thereby causing death.<sup>9</sup>

§ 93. *Spirituuous liquors.* — The same rule applies to the negligent administration of an overdose of intoxicating liquors. Upon an indictment for manslaughter, which charged the prisoner with giving a quartern of gin to a child of the age of four years, which caused its death, and which quantity of gin was

<sup>1</sup> 1 Hale, 475 ; Burton's case, 1 Str. 481.

<sup>2</sup> Fost. 258.

<sup>3</sup> R. v. Bennett, Bell C. C. 1 ; 8 Cox C. C. 74.

<sup>4</sup> 1 Hale, 431 ; R. v. Chamberlain, 10 Cox C. C. 486. When a man lays poison to kill rats, and another man takes it, and it kills him, if the poison was laid in such a manner and place as to be mistaken for food, it is, perhaps, manslaughter ; if otherwise, mis-

adventure only. 1 Hale, 431. See R. v. Michael, 9 C. & P. 356 ; 2 M. C. C. 120, where it is held murder to maliciously administer poison through an unconscious agent.

<sup>5</sup> See infra, § 470, 735.

<sup>6</sup> See Whart. on Neg. § 91, 440, 441, 853, and infra, § 389.

<sup>7</sup> Tessimond's case, 1 Lew. 169.

<sup>8</sup> Ann v. State, 11 Murph. 159.

<sup>9</sup> Tessimond's case, 1 Lew. 169. See infra, § 389.

averred to be excessive for a child of that age, it appeared that the prisoner having ordered a quartern of gin, asked the child if it would have a drop, and that on his putting the glass to the child's mouth, the child twisted the glass out of his hand, and swallowed nearly the whole of the gin, which caused its death. Vaughan, B.: "As it appears clearly that the drinking of the gin in this quantity was the act of the child, the prisoner must be acquitted; but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter; because I have no doubt that the causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age amounts, in point of law, to that offence."<sup>1</sup> So where an indictment for manslaughter stated that the prisoners gave, administered, and delivered to M. A. divers large and excessive quantities of wine and porter, and induced, procured, and persuaded M. A. to take, drink, and swallow the said quantities of spirituous liquors; the same being likely to cause and procure his death, and which the prisoners then and there well knew; and that M. A., by means of the said inducement, procurement, and persuasion took, drank, and swallowed the said large quantities of spirituous liquors; by means whereof he became greatly drunk, &c., and whilst he was so drunk as aforesaid, the prisoners made an assault on him and forced and compelled him to go, and put, placed, and confined him in a cabriolet, and drove and carried him about therein for a long time, and thereby shook, threw, pulled, and knocked about M. A., by means whereof M. A. became mortally sick; of which said large quantities of spirituous liquors, and of the drunkenness occasioned thereby, and of the said shaking, &c., and the sickness occasioned thereby, M. A. died. It appeared that the deceased was in possession of the goods of one of the prisoners under a warrant from the sheriff, and the three prisoners plied him with drink, themselves drinking freely also, and when he was very drunk, put him into a cabriolet, and caused him to be driven about the streets, and about two hours after he was put in the cabriolet he was found dead. Parke, B., after directing the jury to dismiss from their consideration that part of the indictment which alleged that the prisoners knew that the quantity of liquor

<sup>1</sup> R. v. Martin, 3 C. & P. 211.

taken was likely to cause death, of which there did not appear to be any evidence, and which, if proved, would make the offence approach to murder, told the jury that if they were of opinion that the prisoners put the deceased in the cabriolet, then the questions would be : first, whether they or any of them were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose ; or whether, when he had taken it, they put him in the cabriolet for an unlawful purpose. If they thought that the three prisoners, or one of them, made him excessively drunk, to enable the prisoner, whose goods were seized, to prevent the completion of the execution ; or if they were satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, was not an unlawful act, or, if death ensued, an offence that could be construed into manslaughter. Upon the first question stated, it would be essential to make out that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house ; and if that were doubtful, still if, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case would be a case of manslaughter. If, however, they all got drunk together, and afterwards he was put into the cabriolet with the intention that he should take a drive only, that was not an unlawful object, such as had been described, and the prisoners would be entitled to an acquittal. And to a question put by the jury, the learned baron answered, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter.<sup>1</sup>

#### IV. OFFICERS OF RAILROADS.

§ 94. Those conducting or driving a locomotive engine are bound to show in their calling the diligence that good and prudent officers in such departments are accustomed to exercise. If, from lack of such diligence, death ensues either to a passenger in the train or a traveller on the road, the officer guilty of the neg-

<sup>1</sup> R. v. Packard, 1 C. & M. 236.

lect is liable for manslaughter.<sup>1</sup> In carrying out this principle, where the switch tender of a railroad was indicted in New Jersey for manslaughter in neglecting properly to move a switch, whereby loss of life ensued, it was held not necessary to prove that the neglect was wilful or of purpose, and that the question whether due care was shown was exclusively for the jury.<sup>2</sup>

§ 95. When a collision occurs on a railroad, and death is caused, the person responsible, by the English rule, is the man actually in charge of the engine, and whose negligence caused the accident at the time of the collision;<sup>3</sup> and he is responsible if he leave the engine in charge of an incompetent person.<sup>4</sup> But it has been ruled in England, that unless the law imposes a duty on the owners of a railroad to watch the crossing, they are not responsible for injuries which might have been avoided by having a guard at the crossing. Thus, the private servant of the owner of a tramway, crossing a public road, was intrusted to watch it; while he was absent from his duty an accident happened, and a person was killed. The private act did not require the owner to watch the tramway. It was held, that there was no duty between the owner and the public, and therefore his servant was not guilty of negligence, so as to make him guilty of manslaughter.<sup>5</sup> But it is otherwise when a railway tender, undertaking to act as such, to the exclusion of others, neglects to give the proper signal.<sup>6</sup>

§ 96. On an indictment in England against an engine driver, and a fireman of a railway train, for the manslaughter of persons killed while travelling in a preceding train, by the prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger, so as to make it mean not "stop," but "proceed

<sup>1</sup> See topic discussed at large in *Wharton on Negligence*, § 645, 798. and death ensued. See *N. Y. Times*, Jan. 13, 1875.

<sup>2</sup> *State v. O'Brien*, 3 Vroom, 169.

In the Hudson County (New Jersey) court of quarter sessions, on Tuesday, January 12, 1875, John S. McClelland, a telegraph operator, was convicted of negligence in giving a wrong signal to the conductor of an approaching train, in consequence of which a collision

<sup>3</sup> *R. v. Birchall*, 4 F. & F. 108. When there is malice, it is murder. See *Gallihier v. Com.* 2 Duvall (Ky.), 163.

<sup>4</sup> *R. v. Lowe*, 4 Cox C. C. 449.

<sup>5</sup> *R. v. Smith*, 11 Cox C. C. 210.

<sup>6</sup> *Supra*, § 81; *infra*, § 155.

with caution ;" that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes ; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution ; and that their train was being driven at an excessive rate of speed ; and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train, they did their best to stop, but without effect. It was held, *first*, that the special rules, so far as not consistent with the general rules, superseded them ; *secondly*, that if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible ; and, *thirdly*, that the fireman being bound to obey the directions of the engine driver, and, so far as appeared, having done so, there was no case against him.<sup>1</sup>

§ 97. Where a fatal railway accident had been caused by the train running off the line, at a spot where rails had been taken up, without allowing sufficient time to replace them, and also without giving sufficient, or, at all events, effective warning to the engine driver ; and it was the duty of the foreman of the plate-layers to direct when the work should be done, and also to direct effective signals to be given ; it was held, that though he was under the general control of an inspector of the district, the inspector was not liable, but that the foreman was, assuming his negligence to have been a material and a substantial cause of the accident, even although there had also been negligence on the part of the engine driver in not keeping a sufficient lookout.<sup>2</sup> And clearly where an officer charged with the duty neglects to give the proper signs, whereby a collision occurs, causing death, such officer is guilty of manslaughter.<sup>3</sup>

§ 98. Yet in all cases a specific exclusive personal duty must be proved. Thus, where the prisoner was the driver and the deceased was the fireman of a steam-engine on a railway, and the death of the latter was caused by the engine coming into collision with a train standing on the same line of rails, owing to a neglect on a part of the person in charge of the engine to keep a sufficient

<sup>1</sup> R. v. Trainer, 4 F. & F. 105. See as to engineer, Com. v. Kuhn, 1 Crumrine (Pittsburg), 13 ; Wh. Cr. L. 7th ed. § 2530.

<sup>2</sup> R. v. Bengel, 4 F. & F. 504.

<sup>3</sup> R. v. Pargeter, *supra* ; Whart. Cr. L. 7th ed. § 2530.

lookout, and there was evidence that it was the duty of the prisoner or of the deceased to keep a lookout, but there was no evidence as to whom of the two was charged with the duty at the time of the collision; it was held that as there was no exclusive duty imposed on the defendant, he was entitled to an acquittal.<sup>1</sup>

#### V. PERSONS NEGLIGENCELY DROPPING ARTICLES ON A THOROUGHFARE.

§ 99. It is manslaughter negligently to drop articles on a thoroughfare by which a person passing is struck and killed. Of this a pointed illustration is given in a case tried in the Old Bailey, in 1664. The defendant was employed on a building, thirty feet from the highway, and threw down a piece of timber, having first cried out to stand clear. The timber fell upon a person who happened to go out of the way to pass underneath, and killed him. It was held misadventure only, though it was said that if the house had been on a constant thoroughfare, it would have been manslaughter, supposing the warning given to have been imperfect.<sup>2</sup>

On the same view a merchant, who was raising a cask of wine to a third story, over a crowded street, and who let the cask slip, whereby two women were killed, was guilty of manslaughter, as, under the circumstances, the method taken of raising the cask was not sufficiently guarded, and no due notice was given.<sup>3</sup>

<sup>1</sup> R. v. Gray, 4 F. & F. 1098.

<sup>2</sup> R. v. Hull, Kel. 40; *infra*, § 156-8. See fully as to warning, *supra*, § 81. On this point we have the following from the Roman law: "L. 7. D. ad. L. Corn. de sicar. (48. 8.) In lege Cornelia dolus pro facto accipitur: neque in hac lege culpa lata pro dolo accipitur. Quare si quis alto se praecepitaverit, et super alium venerit, eumque occiderit, aut putator ex arbore, quum ramum deliceret, non praeclamaverit, et praetereuntem occiderit, ad huius legis coercionem non pertinet." Gaius III. 211. L. 31. D. ad L. Aquil. (9. 2.) "Si putator, ex arbore ramum quum deliceret, vel machinarius hominem praetereuntem oc-

cidit, ita tenetur, si is in publicum decidat, nec ille proclamavit, ut casus eius evitari possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: culpam autem esse, quod, cum a diligente provideri potuerit, non esset provisum, aut tum denunciatum esset, cum periculum evitari non posset."

<sup>3</sup> R. v. Rigmardon, 1 Lewin, 180. See *infra*, § 156-8. It is negligence for a party, in hanging a sign on a windy day, in a city, upon an active thoroughfare, to use a swinging stage for the purpose that has no rim or some other preventive against the sliding off of tools, which may occasion injury to passers on the street.<sup>1</sup>

<sup>1</sup> Hunt v. Hoyt, 20 Ill. 544.

VI. OFFICERS OF STEAM-VESSELS.

§ 100. By the act of Congress of July 7, 1838, § 12,<sup>1</sup> it is provided that "every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole

As the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured the plaintiff; a train had passed just previously; on examination afterwards, other bricks were found to have fallen out, against the wall.<sup>2</sup>

*Ice, snow, or water falling from roof.* — When the natural consequence of the structure of a building is that ice, snow, or water, falling from it, injures adjacent property, or travellers passing the street on which the building stands, then the owner of the premises is liable for the injury. With regard to the fall of water this point has been long settled. He who fixes to his house a spout or cornice which gathers the water that falls upon his roof, and throws it upon his neighbor's land, is liable therefor.<sup>3</sup> So no man has a right so to construct his roof as to discharge upon his neighbor's land water which would not naturally fall there.<sup>4</sup> "In such a case," says Gray, J.,<sup>4</sup> "the maxim, *Sic utere tuo ut alienum non laedas*, would be applicable. It is not at all a question of reasonable care and diligence in the management of his roof,

and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against."

The same principle applies to roofs so constructed that ice and snow fell from them on travellers in the street below. Thus, it has been held in Massachusetts,<sup>5</sup> that for an injury resulting from the sliding of a mass of ice and snow from a roof upon a person travelling with due care in a highway, the owner of the building is liable, if the roof was subject to his use and control, and he suffered the ice and snow to remain there for an unusual and unreasonable time after he had notice of its accumulation and might have removed it; although all the rest of the building was leased to and occupied by tenants under covenants binding them to keep in repair the premises demised to them. "If," said Chapman, C. J., . . . "one's real estate is thus protected, certainly his person must be equally protected. If the water may not be thrown upon his land, it may not be thrown upon his head while he is standing on his land. A traveller in the use of a highway is as much entitled to protection as if he were the owner in fee simple. And,

<sup>1</sup> Brightly's Digest, 203.

<sup>2</sup> Briggs v. Oliver, 4 Hur. & C. 403.

<sup>3</sup> Reynolds v. Clarke, 2 Ld. Raym. 1399; S. C. 1 Stra. 634; Fay v. Prentice, 1 C. B. 328; Bellows v. Sackett, 15 Barb. 96; Martin v. Simpson, 6 Allen, 102. As to liability of town, see Wharton on Neg. § 982.

<sup>4</sup> Washburn on Easements, 390; Reynolds v. Clarke, 2 Ld. Raym. 1399; Tucker v.

Newman, 11 A. & E. 40; Thomas v. Kenyon, 1 Daly, 132; Martin v. Simpson, 6 Allen, 102.

<sup>5</sup> Shipley v. Fifty Associates, 106 Mass. 194.

<sup>6</sup> Shipley v. Fifty Associates, 101 Mass. 251.



or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any

as a formal proposition, it is true that any act of an individual, though performed on his own soil, if it detracts from the safety of travellers, is a nuisance."<sup>1</sup> And in a subsequent trial between the same parties, it was ruled that under such circumstances the owner of the building is liable, without other proof of negligence, to a person injured by such a fall upon him while travelling on the highway with due care; and it is immaterial that all the rooms in the building are occupied by tenants, if he retains control of the roof.<sup>2</sup>

*Mere falling not enough; must be something to indicate negligence.* — The mere fact that something on a roof falls is not evidence of negligence on the part of the owner of the house. Snow, for instance, or tiles, may be dislodged by sudden gales of wind; and the mere fact, therefore, of snow or tiles falling to the earth would not be sufficient ground to sustain a suit against the owner of the house. If, however, there is anything to show that the thing fell, as in the cases just cited, through the defective structure of the roof, or through a want of care in repairing the roof, or in permitting it to fall into decay, or through negligence of the owner or his servants in handling the thing that falls, then the owner becomes responsible. Thus, as in a well known case, where a barrel of flour fell from the upper window of a house and injured the plaintiff, this by itself was held *prima facie* evidence of negligence, on the ground that in carrying on his trade the defendant would have to move barrels of flour, and

the inference to be drawn from a barrel of flour falling from a window in a store-room, in itself a kind of fall implying negligence, was that a servant of the defendant had been guilty of negligence in moving it.<sup>3</sup> So the falling of a bag of sugar from a crane fixed over a doorway has been correctly held to be a *prima facie* case of negligence, on the ground that the accident was one which in the ordinary state of things would not happen in the use of machinery.<sup>4</sup> On the other hand, mere proof that a plank and a roll of zinc fell through a hole in the defendant's roof on the plaintiff, and that at the same time a man was seen on the roof, is not *prima facie* evidence of negligence on the part of the defendant. There was no proof of negligence on the part of this man, nor that he was a servant of the defendants, and hence, said Cockburn, C. J., in order to charge the defendants with negligence, it was necessary to show that the defendants either "knew, or had the means of knowing, or were bound to take steps to know, the state in which the roof was. As to that the case is entirely bare of evidence. It does not at all follow that because the roof of a building may require repairing, and a workman is directed to repair it, the person giving the direction knows that the roof is in such a state that if the workman steps upon it, it may give way under him. In the great majority of cases, — I may say in all cases with very few exceptions, — where a person desires to have the roof of a building repaired, he employs some one, not only to repair the roof, but to see to its condition;

<sup>1</sup> Dygert v. Shenck, 23 Wend. 447.

<sup>2</sup> Shipley v. Fifty Associates, 106 Mass. 194.

<sup>3</sup> Byrne v. Boadle, 2 H. & C. 722.

<sup>4</sup> Scott v. London Dock Co. 3 H. & C. 596.

person or persons on board such vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement at hard labor for a period not more than ten years."

§ 101. Under this act it has been held that there must be a causal connection between the negligence and the injury, and that the former must appear to be the proximate cause of the latter.<sup>1</sup>

§ 102. *Intent*, in accordance with the principles already stated, does not enter into the issue; it is enough if the defendant, being an officer charged with the particular duty, neglected such duty.<sup>2</sup>

§ 103. A part owner, assuming the duty of an officer, is responsible under the act;<sup>3</sup> but one officer is not liable for another's negligence, unless participating in, or promoting such negligence.<sup>4</sup>

§ 104. *Casus*, or inevitable accident, is, of course, a good defence.<sup>5</sup>

§ 105. If the death is imputable to the imprudence of the deceased, the defendant is not liable, unless such imprudence was a natural result of the defendant's negligence. An interesting point in this connection is thus discussed by Leavitt, J., in a case already cited;<sup>6</sup> "It is insisted, and the court is requested so to instruct the jury, that if the loss of their lives was not the necessary result of the collision, the allegation in the indictment, as to the means by which they came to their deaths, is not sus-

and if he employ a competent person, the business of that person upon proceeding to repair the roof is to look at its condition, and to see how far it will support him or his workmen in doing the necessary repairs."<sup>1</sup>

<sup>1</sup> U. S. v. Collyer, Appendix; and see also U. S. v. Warner, 4 McLean, 463; U. S. v. Taylor, 5 McLean, 242; S. P. R. v. Green, 9 C. & P. 156. "By negligence or inattention in the management of steamboats is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; and it is no matter

what may be the degree of misconduct, whether it is slight or serious, if the proof satisfy that the setting fire to the boat was the necessary or most probable cause of it." Ingersoll, J., in U. S. v. Collyer, citing charge in U. S. v. Farnham, MSS.

<sup>2</sup> U. S. v. Warner, 4 McLean, 463.

<sup>3</sup> U. S. v. Collyer, *ut supra*.

<sup>4</sup> Ibid; S. P. R. v. Allen, 7 C. & P. 153; R. v. Gregory, 2 F. & F. 153; R. v. Birchall, 4 F. & F. 1087.

<sup>5</sup> U. S. v. Warner, 4 McLean, 463.

<sup>6</sup> U. S. v. Warner, 4 McLean, 463.

<sup>1</sup> Welfare v. R. R. L. R. 4 Q. B. 693.

tained; and, consequently, that there cannot be a verdict of guilty on this count, or, indeed, any of the counts in the indictment. The evidence is not satisfactory to prove that any lives were lost except those of persons who left the boat, on floats and rafts. And it is proved, beyond all doubt, that the captain, and probably some other officers of the *Chesapeake*, notified the passengers that they would be safe by getting on the hurricane deck; and it is also clearly proved, that all who sought this place of safety were preserved. Whether the persons who unfortunately resorted to other means to save themselves were apprised of the security afforded by the hurricane deck is not known. If, being made acquainted with the fact, or if, by reasonable vigilance, they could have acquired this information, the persons whose lives were destroyed, under the influence of excessive alarm, unnecessarily and indiscreetly left the boat, preferring to run the hazard of launching into the lake, on floats or rafts, and as a consequence were drowned; the destruction of their lives is not so connected with, and a necessary result of the steamboat disaster, as to make the defendants answerable for their loss. On the other hand, if these persons, under the pressure of the circumstances in which they were placed, conducted with ordinary prudence and discretion, then the allegation in the indictment, as to the means by which they came to their death, is sustained." But if the passengers, in terror naturally caused by the shock, seize the first means of escape, the defendant cannot set up their indiscreetness as a defence, supposing the shock to be attributable to his negligence.<sup>1</sup>

§ 106. Two English cases may be here specifically noticed: "The captain and pilot of a steamer were indicted for manslaughter, in causing a death by running down a smack, and it appeared that at the time the steamer started there was a man forward in the forecastle to keep a lookout, but at the time when the accident happened, which was about an hour afterwards, the captain and pilot were both on the bridge which communicates between the paddle-boxes; the night was dark, and it was raining hard; the steamer had a light at each end of the topsail yard; an oyster smack, on board which the deceased was, was coming up the Thames without any light on board; the deceased was below; a boy who was on board the smack stated that when the

<sup>1</sup> See *infra*, § 366.

steamer struck the smack he got on board the steamer, and found nobody forward; other witnesses were present to show that no person was forward on the lookout at the time. Park, J. A. J.: 'Then the captain is not responsible in felony; it is the fault of the person who ought to be there, and who may have disobeyed orders; if the captain leaves the pilot on the paddle-box as he did here, he is not criminally responsible. In a criminal case every man is answerable for his own acts; there must be some personal act; these persons may be civilly responsible.' Alderson, B.: 'If you could show that there was a man at the bow, and that the captain had said, 'Come away, it's no matter about looking out,' that would be an act of misconduct on his part. If you can show that the death of the deceased was the result of any act of personal misconduct on the part of the captain, you may convict him.' Park, J. A. J.: 'Supposing he had put a man there, and had gone to lie down, and the man walked away, do you mean to say he would be criminally responsible? And you must carry it to that length if you mean to make anything of it.' Alderson, B.: 'I think this case has arrived at its termination: there is no act of personal misconduct or personal negligence on the part of these persons at the bar.'"<sup>1</sup>

Upon an indictment against the captain of a steamer for manslaughter, in causing a death by running down a boat, the counsel for the prosecution, in opening the case, said, "If a party engaged in a lawful occupation is guilty of wilful misconduct, or of gross negligence, it is manslaughter." Park, J. A. J., said: "You must show some act done; you rather state it as if a mere omission on the part of the prisoner in not doing the whole of his duty would be enough; and we are of opinion that is not sufficient. I have no hesitation in saying, that if there was sufficient light, and the captain himself was at the helm, or in a situation to be giving the command, and did that which caused the accident, he would be guilty of manslaughter." Alderson, B.: "There must be some personal act. In the case of a coach, the coachman is driving animals, and in the case of the captain, he is governing reasonable beings." It appeared in evidence that the deceased and two other persons were in a small boat going down the river, when a small steamer used for towing, of which the prisoner was master, met them, and, notwithstanding their

<sup>1</sup> R. v. Allen, 7 C. & P. 153.

shouting, struck the boat, and nearly cut it in two, in consequence of which the deceased was drowned; the waterman proved that he and the captain were on the starboard side of the windlass, and two other men were on the larboard side; that the captain did not leave his place once, and the mate was at the helm, and remained there till after the accident; that the engine was all open, and worked on deck, and made a great noise; that he did not hear the shouting in time to do anything to avert the accident. Park, J. A. J.: "This case has come to its end; at the outside it can only be considered as one of those accidents which will happen in a river navigation; it appears that they kept a proper lookout; and there were several persons on deck at the time.<sup>1</sup> But it should be noticed that if in the last case the judge meant to say generally that a mere omission cannot be negligence, he was in error. Any omission constituting an imperfect discharge of legal duty is negligence, for which the law gives redress."<sup>2</sup>

#### VI. PERSONS DRIVING OR RIDING.

§ 107. Independently of the principles just announced, which bear with equal force upon land as upon water collisions, it must be remembered that there are cases in which the driving of an unsafe horse, like the navigating of an unsafe ship, makes the offending party guilty of manslaughter if death ensue. Thus, if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and

<sup>1</sup> *R. v. Green*, 9 C. & P. 672.

<sup>2</sup> In *Steamboat New World v. King*, 16 How. U. S. 469, the court say, in their opinion: "That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam-boilers but too painfully proves. We do not hesitate,

therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of a gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property."

this appears to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter ;<sup>1</sup> though it would be murder, if the rider intended to divert himself with the fright of the crowd,<sup>2</sup> or to have seriously injured any one whom he might strike.<sup>3</sup>

§ 108. Certain particular requisites, however, must be adhered to in driving, which it is well to keep in mind.

§ 109. *First, as to speed.* Any degree of rapidity, on a thoroughfare, inconsistent with the degree of check with which the horses may be held, will make the owner responsible ; and this rule applies though it appear that prior caution by the person struck might have kept him out of danger.<sup>4</sup> Thus, on an indictment for manslaughter, it appeared that the deceased was walking along a road, in a state of intoxication ; the prisoner was driving a cart drawn by two horses, without reins ; the horses were cantering, and the prisoner was sitting in front of the cart ; on seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and one of the cart-wheels passed over him, and he was killed : it was held that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if, from the rapidity of the driving, or from any other cause, the person cannot get out of the way in time enough, but is killed, the driver is in law guilty of manslaughter ; and that it is the duty of every man who drives any carriage to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur.<sup>5</sup>

*Racing*, if it results in such speed as makes the driver unable to keep his horses in good check, produces a like liability. Thus, upon an indictment for manslaughter, it appeared that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and the witnesses for the prosecution stated that the prisoner was whipping his horses just before his omnibus upset. The defence was, that the horses in the omnibus

<sup>1</sup> 1 East P. C. 231.

<sup>4</sup> Wharton on Neg. § 306, 323,

<sup>2</sup> 1 Hawk. P. C. c. 81, s. 68.

388.

<sup>3</sup> 1 Hale, 475 ; Foster, 263 ; Lee v.

<sup>5</sup> R. v. Walker, 1 C. & P. 320.

State, 1 Cold. (Tenn.) 62.

driven by the prisoner took fright and ran away. Patteson, J., said: "The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be endeavoring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable; for a man is not to say, I will race along a road and when I have got beyond another carriage I will pull up. If the prisoner did really race, and only when he had got past the other omnibus endeavored to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion you ought to convict him."<sup>1</sup>

And so if two persons be driving a cart at a dangerous and furious rate, and they be inciting each other to drive at such rate along a turnpike road, and one of the carts run over a man and kill him, each of the two persons is guilty of manslaughter; and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time.<sup>2</sup> Thus, where the prisoners were indicted for the manslaughter of one James Duroseo, the second count of the indictment charged them with inciting each other to drive their carts and horses at a furious and dangerous rate along a public road, and with driving their carts and horses over the deceased at such furious and dangerous rate, and thereby killing him. The third count charged Swindall with driving his cart over the deceased, and Osborne with being present, aiding and assisting. The fourth count charged Osborne with driving his cart over the deceased, and Swindall with being present, aiding and assisting. Upon the evidence, it appeared that the prisoners were each driving a horse and cart on the evening of the 12th of August, 1845. The first time they

<sup>1</sup> R. v. Timmins, 7 C. & P. 499.

<sup>2</sup> R. v. Swindall, 2 Carr. & Kir. 229; 2 Cox C. C. 273; infra, § 470-5.

were seen that evening was at Draycott toll-gate, two miles and a half from the place where the deceased was run over. Swindall there paid the toll, not only for that night, but also for having passed with Osborne through the same gate a day or two before. They then appeared to be intoxicated. The next place at which they were seen was Tean Bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving; this was 990 yards from the place where the deceased was killed. The next place where they were seen was 47 yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. 'At a turnpike gate a quarter of a mile from the place where the deceased was killed, Swindall, who appeared all along to have been driving the first cart, told the toll-gate keeper, " We have driven over an old man ; " and desired him to bring a light and look at the name on the cart ; on which Osborne pushed on his cart, and told Swindall to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which Swindall said he had sold his concern to Osborne. It appeared that the carts were loaded with pots from the potteries. The surgeon proved that the deceased had a mark upon his body which would correspond with the wheel of a cart, and also several other bruises ; and although he could not say that both carts had passed over his body, it was possible that both might have done so. Greaves, in opening the case to the jury, had submitted that it was perfectly immaterial in point of law whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road ; that that was an unlawful act, and as both had joined in it, each was responsible for the consequences, though they might arise from the act of the other. It was clear that they were either partners, master and servant, or at all events companions. If they had been in the same cart, one holding the reins, the other the whip, it could not be doubted that they would be both liable for the consequences ; and in effect the case was the same, for each was driving his own horse at a furious pace, and encouraging the other to do the like. At the close of the evidence for the prosecution, Allen, Sergeant, for the prisoner, submitted that the evidence only proved that



one of the prisoners had run over the deceased, and that the other was entitled to be acquitted. Pollock, C. B.: I think that is not so. I think that Mr. Greaves is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last, he is equally liable; the person who runs over the man would be a principal in the first degree, and the other a principal in the second degree. Allen, Sergeant: The prosecutor, at all events, is bound to elect upon which count he will proceed. Pollock, C. B.: That is not so. I very well recollect that in *Regina v. Goode* there were many modes of death specified, and that it was also alleged that the deceased was killed by certain means to the jurors unknown. When there is no evidence applicable to a particular count, that count must be abandoned; but if there is evidence to support a count, it must be submitted to the jury. In this case the evidence goes to support all the counts. Allen, Sergeant, addressed the jury for the prisoners. Pollock, C. B. (in summing up): The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct, and if they did so, it matters not whether he was deaf, drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy against the other for damages. So, in order that one ship-owner may recover against another for any damage done, he must be free from blame; he cannot recover from the other if he has contributed to his own injury, however slight the contribution may be. But, in the case of loss of life, the law takes a totally different view,—the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person. Generally it may be laid down that, where one by his negligence has contributed to the death of another, he is responsible; therefore you are to say, by your verdict, whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners. A distinc-

tion has been taken between the prisoners ; it is said that the one who went first is responsible, but that the second is not. If it is necessary that both should have run over the deceased, the case is not without evidence that both did so. But it appears to me that the law, as stated by Mr. Greaves, is perfectly correct. Where two coaches, totally independent of each other, are proceeding in the ordinary way along a road, one after 'the other, and the driver of the first is guilty of negligence, the driver of the second, who had not the same means of pulling up, may not be responsible. But when two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt.<sup>1</sup>

§ 110. *Care to be exercised is that which careful drivers are accustomed to use.*<sup>2</sup>—Hence a driver who fails to exercise such care and thereby injures another is penally responsible.<sup>3</sup>

§ 111. *Care is to be proportioned to danger.*—To drive rapidly on an open country highway, where the danger of collision is slight, is not negligence. On the other hand, rapid driving in a thronged street invokes a peculiar degree of caution,<sup>4</sup> and a

<sup>1</sup> 2 C. & K. 229-232; 2 Cox C. C. 141. *Supra*, § 94.

<sup>2</sup> Wh. on Neg. § 31-46.

<sup>3</sup> *R. v. Murray*, 5 Cox C. C. 509; *R. v. Grout*, 6 C. & P. 629; *Pitts v. Gaines*, 1 Str. 635; 2 Ld. Ray. 1402; *Hall v. Pickard*, 3 Camp. 184; *Barnes v. Hurd*, 11 Mass. 57; *infra*, § 470-5. A foot-passenger in England is not excluded from the use of the carriage way, though there be a foot-path, and hence the killing of him by a carriage is manslaughter in the owner, if reasonable care was not used. Thus a tradesman was walking on a road, about two feet from the foot-path, after dark; but there were lamps at certain distances along the line of road, when the prisoner drove in a cart drawn by one horse, at the rate of from eight to ten miles an hour, according to some witnesses, and from

six to seven miles an hour, according to other witnesses; the prisoner sat on some sacks, laid on the bottom of the cart, and he was near-sighted. Other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. *Bolland, B.*, told the jury that the question was, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty; but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter. *R. v. Grout*, 6 C. & P. 629.

<sup>4</sup> *R. v. Swindall*, *ut supra*; *Wil-*

*fortiori* proof of driving in a public street in a city, at the rate beyond that allowed by law, is sufficient to charge the driver with the consequences that follow from such driving.<sup>1</sup> So also it is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully.<sup>2</sup>

Driving at the rate of fifteen miles an hour, or a mile in four minutes, on a thronged highway, is wilful rashness, *per se*; and if death ensues from a collision thus produced without fault of the injured party, the offence, it seems, would be murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.<sup>3</sup>

§ 112. On this topic the following points, adjudicated in civil issues, may be cited:—

§ 113. *Suddenly whipping or spurring horse close to traveller.*<sup>4</sup> It is negligence to suddenly whip a restive horse close to a traveller.<sup>5</sup>

§ 114. *Driving rapidly into a crowd* is negligent, in proportion to the apparent capacity of the persons so driven into to avoid the collision.<sup>6</sup>

§ 115. *Leaving horse unattended.*— This necessarily exposes the person so negligent to the natural consequences of an unattended horse, moving inadvertently, being meddled with, or taking fright.<sup>7</sup>

§ 116. *Driver not liable for latent viciousness or defects of*

*liams v. Richards*, 3 C. & K. 81; *Garmon v. Bangor*, 38 Me. 443; *Jetter v. R. R.* 2 Keyes, 154.

<sup>1</sup> *Moody v. Osgood*, 60 Barb. 644.

<sup>2</sup> *R. v. Grout*, 6 C. & P. 629; *Williams v. Richards*, 3 Car. & Kir. 82; *Cotton v. Wood*, 8 Com. B. N. S. 571; *Garmon v. Bangor*, 38 Me. 443; *infra*, § 470-5.

<sup>3</sup> *Kennedy v. Way*, Brightly R. 186.

<sup>4</sup> Where the plaintiff was driving a wagon and three horses along a highway, walking in the usual way at the head of the leading horse on his proper side of the road, and the defendant

and his groom were riding at a foot pace (meeting the wagon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, whereupon it kicked out and struck the plaintiff, — it was held, that the act of using the spur, when so near the plaintiff, justified the jury in finding negligence.<sup>1</sup>

<sup>5</sup> *Center v. Finney*, 17 Barb. 94; 2 Seld. Notes, 45.

<sup>6</sup> Whart. on Neg. § 310, 389 a; *infra*, § 470-5; *Edsall v. Vandemark*, 39 Barb. 589.

<sup>7</sup> *Welling v. Judge*, 40 Barb. 193; *Park v. O'Brien*, 23 Conn. 339.

<sup>1</sup> *North v. Smith*, 10 Com. B. N. S. 572.

*horse which he did not know, and which it was not his duty to be acquainted with.*<sup>1</sup>

§ 117. *So as to defective carriage.*—If a collision is caused by a defective carriage, this is negligence in the owner, when the defect was known or ought to have been known by him; otherwise not.<sup>2</sup>

§ 118. *Driving on wrong side of road negligence when productive of collision.*—Of course when a road is free from other travellers, a driver may take his own course.<sup>3</sup> He is not, according to the English rule, bound to keep on the regular side of the road; but if he does not do so, he should use more care and keep a better lookout to avoid collision than would be necessary if he were on the proper side.<sup>4</sup> In this country statutes exist in several states requiring travellers to take the right of the centre of the road where passing others; and even when there are no such statutes, the custom to this effect is so universal that a collision produced by violating it is regarded as negligent.<sup>5</sup> Yet the fact that a driver is on the wrong side of the road will not excuse another for negligently driving into him.<sup>6</sup> And while the rule is strictly applied to persons driving in the dark,<sup>7</sup> it is relaxed in favor of a heavy wagon when meeting one much lighter and much more capable of moving on one side;<sup>8</sup> in favor of a person turning into the road from a cross-road,<sup>9</sup> and *a fortiori* in favor of a horse-car, which cannot move at all off its track.<sup>10</sup> Nor does it apply to one driver seeking to pass another on the same road. The former, being behind, must pick out the safest way of passing, which he takes at his peril.<sup>11</sup>

<sup>1</sup> *Hammack v. White*, 11 C. B. (N. S.) 588; *Sullivan v. Scripture*, 3 Allen, 564.

<sup>2</sup> *Welch v. Lawrence*, 2 Chit. 262; *Whart. on Neg.* § 809.

<sup>3</sup> *Aston v. Heaven*, 2 Esp. 533; *Foster v. Goddard*, 40 Me. 64.

<sup>4</sup> *Plucknall v. Wilson*, 5 C. & P. 375; *Boas v. Litton*, *Ibid.* 407. See *Turley v. Thomas*, 8 C. & P. 103; *Wayde v. Carr*, 2 D. & R. 255.

<sup>5</sup> *Kennard v. Burton*, 25 Me. 39; *Brooks v. Hart*, 14 N. H. 307; *Earing v. Lansing*, 7 Wend. 185; *Kennedy v. Way*, Bright. R. 186.

<sup>6</sup> *Whart. on Neg.* § 345, 388, 400; *Davies v. Mann*, 10 M. & W. 546; *Spofford v. Harlow*, 3 Allen, 176.

<sup>7</sup> *Cruden v. Fentham*, 2 Esp. 685.

<sup>8</sup> See *Grier v. Sampson*, 27 Penn. St. 183.

<sup>9</sup> *Lovejoy v. Dolan*, 10 Cush. 495.

<sup>10</sup> *Hegan v. Eighth Av. R. R.* 15 N. Y. 380. See *Suydam v. Grand St. R. R.* 41 Barb. 375; *Willbrand v. Eighth Av. R. R.* 3 Bosw. 314.

<sup>11</sup> *Avegno v. Hart*, 25 La. An. 235; *Bolton v. Colder*, 1 Watts, 360.

§ 119. *Noise and violence in driving, causing another horse to take fright.* — This is on general principles negligence.<sup>1</sup> Hence a noisy and violent driver, causing another's horse to take fright, is liable for the consequences.<sup>2</sup>

§ 120. *Passing another on road.* — A driver who negligently attempts to pass another on a public road is liable for any damages which may be traced to his recklessness.<sup>3</sup>

§ 121. *Street-cars and sleighs.* — The rule as to steam-cars has been already noticed.<sup>4</sup> Horse-cars are less likely to inflict damage; but even as to these, from their noiselessness and their heavy momentum, the rule applies that bells should be used (except when forbidden on Sundays by local ordinance), and that at night they should display lights.<sup>5</sup> Care is exacted from the driver of such car in proportion to the danger with which the travel is attended.<sup>6</sup> Horse-railroads, like all other railroads, are liable for injuries produced by their non-repair of track.<sup>7</sup>

For *sleighs* the usage is to require bells, but the mere want of bells by a colliding sleigh is not negligence, without proof that the collision was thereby caused.<sup>8</sup>

§ 122. *Driving without reins.* — So driving without reins, and without due restraint of the horse, is such negligence as to charge the driver with manslaughter if death ensue, unless it should appear that the same result would have occurred had the reins been in the driver's hands.<sup>9</sup>

§ 123. *Neglect of lookout.* — So it appears that if the driver might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection.<sup>10</sup> A. was driving a cart with four horses in the highway at Whitechapel, and he being in the cart, and the horses upon a trot, they threw down

<sup>1</sup> Whart. on Neg. § 835 b.

<sup>7</sup> Worster v. 42d St. R. R. 50 N.

<sup>2</sup> Burnham v. Butler, 31 N. Y. 480; Y. 203.

Rowe v. Young, 16 Ind. 312; Welch <sup>8</sup> Parker v. Adams, 12 Metc. 415.

v. Lawrence, 2 Chit. 262; infra, See Kennard v. Burton, 25 Me. 39; Burnham v. Butler, 31 N. Y. 480; § 470-5.

<sup>3</sup> Avegno v. Hart, 25 La. An. 235; infra, § 470-5.

Burnham v. Butler, 31 N. Y. 480.

<sup>9</sup> R. v. Dalloway, 2 Cox C. C. 273.

<sup>4</sup> Supra, § 94.

See R. v. Murray, 2 Cox C. C. 509.

<sup>5</sup> Johnson v. Hudson Riv. R. R. 29

<sup>10</sup> Foxt. 263; infra, § 470-5. See

N. Y. 65; Shea v. R. R. 44 Cal. 414.

Whart. on Neg. § 789; Pluckwell v.

<sup>6</sup> Com. v. Met. R. R. 107 Mass. 236;

Wilson, 5 C. & P. 375; Kennedy v.

Mangam v. Brooklyn City R. R. 38

Way, Brightly R. 186.

N. Y. 455.

a woman, who was going the same way, with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder, Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter.<sup>1</sup> But upon this case Mr. East remarked: "It must be taken for granted, from this note of the case, that the accident happened in a highway, *where people did not usually pass*; for otherwise the circumstance of the driver's being in the cart and going so much faster than is usual for carriages of that construction, savored much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person who could not get out of the way in time. And, indeed, such conduct, in a driver of such heavy carriages, might, under most circumstances, be thought to betoken a want of due care, if any, though but few, persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required; but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it, which persons in similar situations are accustomed to do."<sup>2</sup>

§ 124. *Carter must stand at horse's head.* — A carter, who is supposed not to have the means of controlling his horse when standing in the cart, is bound to keep at his horse's head or side, and if in consequence of his neglect in this respect death follows, he is guilty of manslaughter. Upon an indictment for manslaughter, the evidence was that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there, the cart went over a child, who was gathering up flowers on the road. Bayley, B., held that the prisoner, by being in the cart, instead of at the horse's head or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter.<sup>3</sup>

*All parties concerned in negligence liable as principals.* — When two drivers were negligently racing with their respective carts on a public road, and one of the carts killed a traveller on the

<sup>1</sup> 1 East P. C. 263.

also Repsher v. Wattson, 5 Harris, 365.

<sup>2</sup> Ibid.

<sup>3</sup> Knight's case, 1 Lew. 168. See

road, both drivers were held responsible for manslaughter.<sup>1</sup> And this rule holds good in respect to all cases where an injury is produced to an innocent third person by a collision between two parties who are both negligent.<sup>2</sup>

#### VIII. NOXIOUS ANIMALS.

§ 125. *Letting loose imposes liability.* — He who lets loose a dangerous animal is responsible for death caused by such animal, provided he either knew of the animal's dangerous tendencies,<sup>3</sup> or was in such a position that he should have known of such tendencies.<sup>4</sup> If the mischief was undesigned by the defendant, the offence is manslaughter; if designed, murder.<sup>5</sup>

<sup>1</sup> R. v. Swindall, 2 C. & K. 229; 2 Cox C. C. 141. Supra, § 109.

<sup>2</sup> Colegrove v. N. Y. & N. H. R. R. 20 N. Y. 492; aff. S. C. 6 Duer, 382; Lockhardt v. Lichtenthaler, 46 Penn. St. 151; Barrett v. The Third Ave. R. R. Co. 45 N. Y. 628; Thorouggood v. Bryan, 8 C. B. 115; Catlin v. Hills, 8 C. B. 123; R. v. Haines, 2 C. & K. 368.

<sup>3</sup> R. v. Dant, L. & C. 567; 10 Cox C. C. 102.

<sup>4</sup> Whart. on Neg. § 904.

<sup>5</sup> A person who negligently puts animals in a position in which they are likely to do harm, is, on principles elsewhere fully discussed, liable for such harm. Whart. on Neg. § 100. And he who uses a dangerous instrument is liable for the natural and probable mischievous consequences of the use of such instrument, in case he could, by due circumspection, have prevented such mischievous consequences. Wharton on Neg. § 851. The chief point as to which difficulty arises in the application of these principles is that which concerns the degree of knowledge the owner of the animal is presumed to possess of its mischievous tendencies. And as to this it is assumed by both the Roman law and our own that when these tendencies are natural to the animals,

they are to be regarded as natural laws, knowledge of which it is supposed belong to all men. On the same principle in which the tendency of heavy bodies to fall is regarded as a matter of common notoriety, so the tendency of animals to act according to their nature is regarded as a matter of common notoriety. Hence a person who negligently puts an animal in a position in which, following the laws of its nature, it does mischief, is as liable for the consequences as fully as is a person who negligently puts a heavy body in such a position that it falls. § 1. Inst. (IV. 9); L. 4. D. (IX. 1); Whart. on Neg. § 907.

So far as concerns the worrying and biting of human beings, it seems by Anglo-American law to be settled that the ferocious nature of the dog is so far extinguished by domestic life as to throw upon a party injured the burden of proving that the owner of the dog had knowledge of its tendency so to worry and bite. See Read v. Edwards, 17 C. B. (N. S.) 245; Thomas v. Morgan, 1 C., M. & R. 496; Marsh v. Jones, 21 Vt. 378; Brown v. Carpenter, 26 Vt. 638; Woolf v. Chalker, 31 Conn. 21; Fairchild v. Bentley, 30 Barb. 147; Buckley v. Leonard, 4 Denio, 500; Sherfy v. Barclay, 4 Sneed, 58; Bender v. Bar-

## IX. PERSONS HAVING CHARGE OF CHILDREN OR OTHER DEPENDENTS.

§ 126. *Summary of law.* — The law in this connection may be summed up in the following propositions, some of which have been already incidentally noticed.

nett, 7 Ala. 169; McCaskill v. Elliott, 5 Strob. 196; Jackson v. Smithson, 15 M. & W. 563; Hudson v. Roberts, 6 Exch. 697; Vrooman v. Lawyer, 13 Johns. 339; Wheeler v. Brant, 23 Barb. 324.

*No liability attaches for a sudden and unlikely act of mischief done by an animal whose natural tendency is not to do such mischief.* Blake-more v. R. R. 8 E. & B. 1085; Keshan v. Gates, 2 N. Y. S. C. 288; Park v. O'Brien, 23 Conn. 339; Sullivan v. Scripture, 3 Allen, 364; Welden v. R. R. 5 Bosw. 576; Ficken v. Jones, 28 Cal. 618. Thus the owner of a horse is not liable for damages caused by a sudden fright of the horse, supposing there be no negligence on the part of the driver, and the horse was one fit to be driven. Goodman v. Taylor, 5 C. & P. 410; Wakeman v. Robinson, Bing. 213; 8 Moore, 63; Hammock v. White, 11 C. B. (N. S.) 588; Aston v. Heaven, 2 Esp. 533. Nor according to the Roman law, and no doubt to our own, would the owner of a quiet house-dog be liable for injury done by him in a sudden attack of madness. And according to the Roman law, as just stated, the master is not liable when a wild animal escapes through *casus*. So the fact that a mare, ordinarily gentle, is in the habit of kicking other horse kind when in heat, it has been ruled in a case elsewhere cited, imposes no duty upon the owner to restrain her at other times, and his failure to do so would not be sufficient to make him responsible for her kicking another horse when she was not in heat.

Tupper v. Clark, 43 Vt. 200. So the owner of an elephant, lawfully in its place, has been held not to be liable for the fright its mere appearance occasioned to a passing horse. Scribner v. Kelley, 38 Barb. 14.

As in civil issues, so in criminal, the turning point (the *corpus delicti* being proved) is the character of notice required to make owner liable for special and non-natural tendencies of animal. For, while the owner of an animal is liable without notice for its generic peculiarities, notice of some kind is necessary in order to make him liable for mischief done by it in accordance with tendencies as to which it differs radically from its race. In what way this notice is proved in respect to dogs is illustrated by several cases. Thus, it has been held unnecessary to show that a dog has bitten another man before it bit the plaintiff; it is sufficient to show that the defendant knew that it had evinced a savage disposition by attempting to bite. Worth v. Gilling, L. R. 2 C. P. 1. And in an action for injury inflicted by the bite of a dog, in order to establish the *scienter*, it was proved that the wife of the defendant (who was a milkman) occasionally attended to his business, which was carried on upon premises where he kept the dog, and that a person had gone there and made a formal complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew. Upon this it was held, that there was evidence of the husband's knowledge of the dog's propensity to bite. Gladman v. Johnson



§ 127. A mere omission to aid a person in necessity is not generally indictable, even though the death of such person is immediately chargeable to the omission.<sup>1</sup>

36 L. J. C. P. 153. In giving his judgment, Bovill, C. J., said: "I am not prepared to assent to the proposition, that notice to an ordinary servant, or even to a wife, would in all cases be sufficient to fix the defendant, in such an action as this, with knowledge of the mischievous propensity of the dog; but here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife when on the premises, and for the purpose of being communicated to the husband. It may be, that this is but slight evidence of the *scienter*, but here the only question is, whether it is evidence of it? I think it is." But more recently, notice to a servant is held notice to master. *Applebee v. Percy*, L. R. 9 C. P. 627. It has been held in New Hampshire and Connecticut, that one instance of prior biting was enough to charge notice. *Arnold v. Norton*, 25 Conn. 92; *Kittredge v. Elliott*, 16 N. H. 77. And in New York two instances. *Buckley v. Leonard*, 4 Denio, 500. See *Loomis v. Terry*, 17 Wend. 496. So it has been held, that in a suit for a bull hurting a horse, it was competent to show that the owner knew that the bull had previously attacked a man. *Cockerham v. Nixon*, 11 Ired. (N. C.) 269.

*Knowledge of noxious propensity by owner may be presumed.* — It has been just stated, that the keeper of wild animals is liable for any damage which they may cause by his detention of them, and that it is not necessary to prove that he knew of their evil propensities. See *May v. Burdett*, 9 Q.

B. 101 (a monkey); *Besozzi v. Harris*, 1 F. & F. 92 (a bear). And that the owner of animals of all classes, tame or wild, is assumed to be cognizant of their generic noxious tendencies; but that the owner of domestic animals is not liable for such damages perpetrated by them as are not in accordance with their nature, unless he knows or ought to know their tendency to such noxiousness. Not infrequently do we meet with cases in which this doctrine is so expressed as to make it appear that positive notice was brought home to the defendant of some prior similar mischievous exploits of the animal. *Cox v. Burbridge*, 13 C. B. N. S. 430; *Beck v. Dyson*, 4 Camp. 98; *Card v. Case*, 5 C. B. 622; *Stiles v. Cardiff*, 33 L. J. Q. B. 310; *Woolf v. Chalker*, 30 Conn. 121; *Earl v. Van Alstone*, 8 Barb. 630; *Vrooman v. Lawyer*, 13 Johns. 339; *Fairchild v. Bentley*, 30 Barb. 147; *Stiles v. Nav. Co.* 33 L. J. Q. B. 310, quoted Campb. on Neg. p. 103.

Indeed, so common was this misapprehension of the law that, as has been seen, it has been thought necessary in England, and some parts of the United States, to pass statutes protecting at least the sheep-growing and other industries, by finding that, in actions against the owners of dogs for worrying, it is not necessary to prove a *scienter* on part of the owner. So in Pennsylvania, as to horses and cattle: *Goodman v. Gay*, 15 Penn. St. 188; as to sheep: *Campbell v. Brown*, 19 Penn. St. 359; 1 Grant, 82. In Vermont, as to rams: *Town v. Lamphire*, 37 Vt. 52. In Massachusetts, as to animals straying on highway: *Barnes*

<sup>1</sup> Supra, § 72.

§ 128. To constitute criminal liability for such omission, it must appear that the deceased person was in the exclusive legal charge of the defendant, or of the defendant and his associates ; and that the deceased was incapable of self-help.<sup>1</sup>

§ 129. If the deceased was capable of self-help, or of applying for help to others, then (unless made so by statute) the defendant cannot be convicted of homicide on the ground that had he supplied help the death would not have occurred.<sup>2</sup>

§ 130. Inability on part of the defendant to have given the required help is no defence, if it be shown that he could have received the aid of others, but declined to call for such aid.<sup>3</sup>

§ 131. The defendant, if his omission was the result of a conscientious error of judgment in the nursing of a child or dependent, cannot be convicted of manslaughter if there was no culpable neglect of duty on his part.<sup>4</sup>

v. Chapin, 4 Allen, 444 ; as to sheep : *McCarthy v. Guild*, 12 Metc. 291 ; *Pressey v. Wirtly*, 3 Allen, 191 ; as to dogs, special statutes are enacted in Massachusetts and other states. See *Barrett v. R. R.* 3 Allen, 101. In New York, as to sheep : *Osincup v. Nichols*, 49 Barb. 146 ; *Auchmenty v. Ham*, 1 Denio, 495 ; *Wiley v. Slater*, 22 Barb. 506. In Wisconsin, as to sheep : *Denny v. Lenz*, 16 Wisconsin, 566.

But the true view is that the owner is to be presumed to know the viciousness of the animal in all cases where it is his duty to know of such viciousness. Such, indeed, is the rule as to negligence in other analogous branches of the law. See other cases in *Whart. on Neg.* § 921-3. "By a vicious propensity," says *Grover, J.* (*Dickson v. McCoy*, 39 N. Y. 400 ; see *Keshan v. Gates*, 2 N. Y. S. C. 288), "is included a propensity to do any act that might endanger the safety of the person or property of others in a given situation ; not such only as would impair the utility of the animal for the purpose for which it is kept."

<sup>1</sup> *Supra*, § 74 ; *R. v. Edwards*, 8 C.

& P. 611. See *R. v. Marriott*, 8 C. & P. 425.

<sup>2</sup> *Supra*, § 78 ; *R. v. Shepherd*, 9 Cox C. C. 123 ; *L. & C.* 147 ; *R. v. Friend*, R. & R. C. C. 20.

<sup>3</sup> *Supra*, § 77 ; *R. v. Chandler*, *Dears.* C. C. 453 ; *R. v. Mabbett*, 5 Cox C. C. 339.

<sup>4</sup> *Supra*, § 79 ; *R. v. Wagstaff*, 10 Cox C. C. 530.

Of a recent trial involving this question, the *London Times* (August, 1874) thus speaks :—

"The trial of Thomas Hines, one of the sect known as the 'Peculiar People,' who was brought before Baron Pigott yesterday on a charge of manslaughter, at the central criminal court, will, it may be hoped, be the last of the class to which it belongs. The prisoner was accused of having caused the death of his child by neglecting to provide it with necessary and proper food and with medical attendance ; but there was clearly no ground for the charge as far as food was concerned, and the question of medical attendance was the only one left for consideration. The 'Peculiar People,' of whose other tenets we

§ 132. To do an act towards a person who is helpless, which naturally and ordinarily leads to the death of such person, is murder, if death or grievous bodily harm is intended; and manslaughter if the act be done negligently.<sup>1</sup> Such being the general principles governing this branch of the law, the following illustrations may now be noticed:—

§ 133. *Husband and wife*.—A husband is bound to afford nurture and comfort to his wife, and if she dies from the want of it he is guilty of manslaughter;<sup>2</sup> though if there is a separa-

are ignorant, have rendered themselves notorious on several occasions by their passive resistance to the prevailing custom of sending for doctors to visit and attend their sick. They interpret literally the injunction of the Apostle James to call in the elders of the Church to pray and to anoint with oil, and they not only interpret this injunction literally, but they regard it as containing their whole duty in the matter, and as excluding any resort to the aid of medicine. It was proved that the child, whose death was made the subject of the indictment, was taken ill at the end of May, and that he died on the 6th of July following. No doctor was called to him, nor was any medicine given; but he was watched and tended carefully, was anointed and prayed over, and was fed not only with ordinary food, but also with port wine, brandy, arrow-root, milk, and tea. The reason why no medical advice was sought was that recourse to it is contrary to the faith of the sect, who in such cases 'trust in the Lord.' The medical evidence was to the effect that the disease was of a nature to have been amenable to treatment, and that if a doctor had been called in, the chances of the child's recovery would have been increased. It was then contended, on the part of the prosecution, that medical attendance was a 'necessary,' which the parent of this child of ten-

der age was bound to provide, and that there had been such criminal neglect on his part as would render him liable to legal penalties.

"It is a matter for congratulation, as regards the liberty of the subject, that Baron Pigott, upon this evidence, decided that there was no case to go to the jury, and directed an acquittal. The learned baron said that the prisoner, 'instead of being guilty of culpable negligence, appeared to have done everything for the good of his child according to his lights. He might be a person with narrow or perverted views, and altogether mistaken in his interpretation of the passage of Scripture that had been quoted during the trial,' but there was nothing to show any neglect of duty on his part. The common sense of the public will heartily concur with this view of the case, and will perceive the impolicy of instituting a criminal trial upon the grounds assigned. If the profession of a religious scruple against medical aid were made to cover neglect of other kinds, then there need be no hesitation about punishing such conduct as an offence; but the medical art has not yet reached a state in which the mere absence of a doctor can be held to establish a charge of manslaughter."

<sup>1</sup> R. v. Walters, C. & M. 164; R. v. Smith, L. & C. 607; 10 Cox C. C. 82. See *infra*, § 358.

<sup>2</sup> *Supra*, § 75.

tion by mutual consent, and a separate maintenance is allowed to and accepted by her, he is not responsible for her death from want, unless he do some act directly exposing her to death. In a case tried in England in 1844, before Gurney, B., this topic was carefully investigated. It appeared from the evidence that the prisoner and the deceased were married, and that for about four years previous to the death of the wife, which event took place on the 24th November, 1843, they had separated by mutual consent, the prisoner allowing her 2s. 6d. a week. This sum had been in general regularly paid, and the last payment was on the Sunday preceding her death, namely, the 19th November; from that day the deceased had been ailing. On Tuesday, the 21st November, she was turned out of her lodgings, being at that time suffering from diarrhœa, sickness, and extreme pain. She proceeded to a surgeon who gave her some medicine. This she took, which somewhat relieved her; and the following day she again visited the surgeon, who gave her some more medicine, together with a note to the relieving officer of the Union. This was never delivered. About the middle of that day she was at the house of a person of the name of Weller in a state of great illness and suffering, when the prisoner, her husband, passed by. Mrs. Weller called him in telling him he must take his wife away as she could not shelter there. The prisoner replied, "Turn her out; I won't be pestered with her," and then walked away. On the night of Wednesday, which was wet and dark, she was seen by a police constable wandering about seeking shelter at Foot's Cray. The constable took her to a house where the prisoner, her husband, lodged. On calling him the prisoner came to the window, when the constable told him of the state of his wife, who was ill and without lodging, and explained to him that it was incumbent on him to provide her with lodging and relief. The prisoner answered that he had no lodging for her, that she was a nasty beast, and that he could not live with her; and immediately after he shut the window and went away. The constable would not positively swear that the prisoner actually saw that his wife was there with him. The deceased refusing to accompany the constable to the station-house he left her. At nine A. M. he subsequently found her sitting down in a privy, the door of which was unbolted, which was at the back of some houses. It was

raining hard and blowing a gale of wind, and she had closed the door. She appeared then ill and wet. At seven P. M. on the following day, Thursday, the deceased came to the Black Horse public-house at Sidarp, being to all appearance very ill. The prisoner was at the moment in the public-house with some friends, and when told of the state of his wife said, "She had never been a wife to him for three years; but yet, if the landlady would afford her the accommodation of a bed he would pay for it." She had already received a bed from the landlady, for which the deceased offered to pay her and she went to bed. On the next morning (Friday) the deceased was found to be in a dying state. She expired before medical aid could be procured. It appeared from the *post mortem* examination which had been made, that the deceased was laboring under a complication of mortal diseases, which must have speedily resulted in death. The surgeon who opened the body gave it as his opinion that the immediate cause of death was diarrhoea, brought on by exposure to the inclemency of the weather; and that he considered the period of her existence had been abridged in consequence of her not having had shelter on Wednesday night. In his defence the prisoner stated to the jury the causes which led him to separate from the deceased, and said that in a conversation which he had with Mr. Wells on the Wednesday, he offered to pay for whatever relief the parish might afford to his wife. He further added, that when the constable called him up on the Wednesday night, his landlord would not allow him to admit the deceased, but that he then promised to procure her a lodging on the next day. Gurney, B. (to the jury): "The prisoner stands indicted for manslaughter. But this manslaughter wears a very different aspect from those which ordinarily come under our notice. In the great majority of cases the manslaughter, indeed, I may say in almost all such cases, the death is the result of some violent act done or committed. Here, however, the charge is that the prisoner, being the husband of the deceased, did wilfully neglect to provide her with proper shelter, by reason of which her death was accelerated. There are other counts charging him with neglecting to provide her with food, but no evidence has been adduced in support of them. But whether the death of the deceased was actually caused by the act of the prisoner, or was only accelerated by it, the effect is the same in

point of law. If, notwithstanding the nature and extent of her complaints, she could have lived on till the next month or the next week, and her death prematurely occurred on the morning of Friday the 24th November, owing to, or by the misconduct of the prisoner as laid in the indictment, then he is amenable to the law for such misconduct. It appears that the prisoner and his deceased wife had been separated for a considerable time, and that he had agreed to allow her 2s. 6d. a week. Though it does not distinctly appear that this sum was paid punctually every week, still it does appear that on the Sunday preceding her death the deceased had received the stipulated sum. There is, therefore, presumably no ground for any charge against the prisoner as having caused her death from want of food, as the half-crown would have supplied her from the Sunday till the Friday. The charge against the prisoner appears to be that he refused intentionally to provide her with shelter against the inclemency of the weather, she being at the same period of time in a state of disease progressively advancing, then very advanced indeed, and which no doubt would soon have ended her sufferings. For the four days preceding her death there is evidence of her state. [The learned baron here read over his notes of the evidence.] On the night of Wednesday, when the deceased was in the privy, the door was closed. The deceased was, therefore, in so far sheltered from the weather, and she requested the constable not to take her to the station-house, which is a remarkable fact, for there she would have found both shelter and warmth. The facts that particularly affect the prisoner in this case are, first, the request made to him by Mrs. Weller on Wednesday, when she asked him to take care of his wife, which he refused to do. This refusal was about mid-day on Wednesday, and you have heard stated in evidence the state in which the deceased woman then was. On the Wednesday evening in November, on a cold and rainy night, the constable knocks at the window of the prisoner's house, and states that his wife applies to him for shelter, but he shuts the window and refuses it. Such are the facts of the case. You will consider that he had regularly paid her allowance to her, and that he might have been compelled to pay her a larger sum if that had not been sufficient. Under ordinary circumstances he might have refused to have anything to do with her, but when she was ill, and without shelter, on a cold and wet night in

November, the question assumes a different aspect ; and it is this, whether you can certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than the event would have happened in the ordinary progress of the disease, — sooner, in a word, than if such refusal had not been given. That is really the question for your consideration. Many cases have been decided on the precise extent to which a father, husband, or master is bound to provide for his child, wife, or servant. But in those cases the parties were living under the roof of the parent, husband, or master, which implied a particular obligation. But here the circumstances are different, for the parties were actually separated. Whether this circumstance should take the case out of the ordinary rule is a point which, if necessary, I will reserve for further consideration. But I will now take the opinion of you, gentlemen of the jury, as to whether the prisoner did, on the night of Wednesday, refuse to give his wife shelter, and whether his so refusing to do so, and leaving her in the state of bodily disease, in which she then was, exposed to the inclemency of the weather, accelerated her death. It does not appear in evidence that he knew what her disease was, or that she was afflicted with that mortal illness under which she labored, or that she was suffering from the diarrhoea which caused her death ; but he was, nevertheless, informed that she was very ill, and had not shelter. If you should be of opinion that her death was caused or accelerated by his conduct in refusing to give her shelter, you will say that he is guilty. If on the contrary you entertain any doubt on this point, you will acquit him. Various cases have occurred, and will, no doubt, occur again, in which, though juries may highly disapprove of, and reprobate the conduct of parties, yet in which, nevertheless, they cannot, with safe consciences, convict them on a criminal charge." The defendant was acquitted.<sup>1</sup>

§ 134. *Parent and child.* — So far as concerns the neglect of a mother to properly attend to a bastard child after birth, statutes exist by which the common law offence is absorbed. Independent of these statutes, it may be generally stated that for a parent, having exclusive charge of an infant child, to so culpably neglect it that death ensues as a consequence of such neglect, is manslaughter, if death or grievous bodily harm were not in-

<sup>1</sup> R. v. Plummer, 1 C. & K. 602. See supra, § 75 ; infra, § 376-8.

tended; and murder if there was an intent to inflict death or grievous bodily harm.<sup>1</sup> To constitute murder there must be means to relieve, and wilfulness in withholding relief.<sup>2</sup> If the parent has not the means for the child's nurture, his duty is to apply to the public authorities for relief; and failure to do so is itself culpable neglect, wherever there are public authorities capable of affording such relief.<sup>3</sup> Hence it is not necessary to aver in the indictment possession of means by the parent.<sup>4</sup>

When a child grows to sufficient age to be capable of applying for aid himself, and is at full liberty so to do, then the parent's neglect to supply his wants is not the subject of indictment.<sup>5</sup> Nor can the parent's conscientious errors of judgment be in this way punished.<sup>6</sup>

Much doubt exists as to the legal obligation of a father to support an illegitimate child, though as to the fact of the moral duty there can be no question.<sup>7</sup> Puffendorf tells us<sup>8</sup> that "maintenance is due not only to legitimate children, but even to incestuous issue." But be this as it may, it is clear that when a party assumes the guardianship of a child, whether as putative or step parent, he becomes responsible for mismanagement or neglect.<sup>9</sup>

A married woman, however, cannot be convicted of the murder of her illegitimate child, three years old, by withholding from it proper food, unless it be shown that her husband supplied her with food to give the child, and that she wilfully withheld it.<sup>10</sup>

§ 135. *Deserting children.* — To place a helpless infant child in such a position that it cannot live, is murder if the intent be to kill; manslaughter if the desertion be negligent.<sup>11</sup>

<sup>1</sup> Supra, § 74; infra, § 304; R. v. Chandler, Dears. C. C. 453; R. v. Mabbett, 5 Cox C. C. 339; R. v. Bubb, 4 Cox C. C. 455; R. v. Conde, 10 Cox C. C. 547; R. v. Ryland, 1 L. R. C. C. 99; 10 Cox C. C. 569. See, however, R. v. Knights, 2 F. & F. 46.

<sup>2</sup> R. v. Saunders, 7 C. & P. 277.

<sup>3</sup> Supra, § 79; R. v. Mabbett, 5 Cox C. C. 339; R. v. Bubb, 4 Cox C. C. 455.

<sup>4</sup> R. v. Ryland, 1 L. R. 99; 10 Cox C. C. 569.

<sup>5</sup> Supra, § 78; R. v. Shepherd, 9 Cox C. C. 123; L. & C. 147.

<sup>6</sup> Supra, § 79, 131.

<sup>7</sup> Nichols v. Allen, 3 C. & P. 36.

<sup>8</sup> Book 4, c. 11, s. 6.

<sup>9</sup> Stone v. Carr, 3 Esp. 1; Cooper v. Martin, 4 East, 77; Williams v. Hutchinson, 3 Comst. 312; Sharp v. Cropsey, 11 Barb. 224; Murdock v. Murdock, 7 Cal. 511; Gillett v. Camp, 27 Mo. 541; Hussey v. Roundtree, Busbee Law (N. C.), 110; Lantz v. Frey, 14 Penn. St. 201; Davis v. Goodenow, 27 Vt. 715; Brush v. Blanchard, 18 Ill. 46; Schouler Dom. Rel. 378.

<sup>10</sup> R. v. Saunders, 7 C. & P. 277.

<sup>11</sup> R. v. Walters, C. & M. 164; R. v. Ridley 2 Camp. 640, 653; R. v.



§ 136. *Master, and apprentice.* — So also as to the relation of master and apprentice.<sup>1</sup> Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehavior, in a filthy and distempered condition, did not take that care of him which his situation required; and the death of the apprentice, in the opinion of the medical witnesses, was probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home, they thinking that if he had been properly treated when he came home, he might have recovered; the court, under these circumstances, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill-treatment he received from his master after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice; in which case they were to find him guilty of murder.<sup>2</sup> And it is now held that the same principle applies to the withholding of proper food, so that death ensues. Thus, in a modern case, it appeared that the prisoners, who were a husband and wife, had used the deceased, who was their apprentice, in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received. The court was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; the husband, however, was found guilty and executed.<sup>3</sup> Yet, supposing the apprentice was capable of applying elsewhere for aid, or for release from his indentures, the master, on the principles already stated, would not be liable for the homicide, unless it should appear that the deceased was prevented by fear of violence, or other circumstances, from applying for such relief.<sup>4</sup>

§ 137. A master is certainly liable to the apprentice for damages, if the latter suffers from want of proper medicines or

Waters, T. & M. 57; 1 Den. C. C. 356; 2 C. & K. 864; R. v. Philpott, Dears. C. C. 179; 6 Cox C. C. 140.

<sup>1</sup> See *supra*, § 74.

<sup>2</sup> Self's case, 1 East P. C. 226; 1 Leach C. C. 137.

<sup>3</sup> R. v. Squire, 1 Russ. on Cr. 491. See R. v. Ridley, 2 Camp. 650.

<sup>4</sup> Anon. 5 Cox C. C. 279. See *supra*, § 78.

attendance.<sup>1</sup> Supposing the apprentice to be sick, and unable to apply for aid himself, or to be prevented in any way from making such application by the master, a criminal prosecution may be maintained for such neglect.<sup>2</sup>

§ 138. In an English prosecution, the first count of the indictment alleged that the deceased was the apprentice of the prisoner, and that it was his duty to provide sufficient food for her as such apprentice, and that he neglected to do so, &c., by means of which she died; and in another count it was alleged that the deceased was the servant of the prisoner, and that it was his duty to provide her with food, &c. An invalid indenture of apprenticeship was put in, and it appeared that the deceased had always been treated as an apprentice by the prisoner, and had performed such duties as an apprentice would have performed, but the prisoner being a farmer, these duties were the same as those performed by ordinary farmers' servants. It was objected that the first count was not proved, as the indenture was invalid; and that the relation of master and servant never existed, for an invalid contract of apprenticeship could not be converted into a hiring and service; that the foundation of this indictment was that the prisoner was legally bound to provide maintenance for the deceased, and here it was clear he could neither have been compelled to support her as an apprentice or as a servant. But it was held that the prisoner having treated the deceased as his servant, could not turn round and say she was not his servant at all.<sup>3</sup>

Where one count stated that the deceased was the apprentice of the prisoner, and that it was his duty to provide the deceased with proper and necessary nourishment, medicine, medical care and attention, and charged the death to be from neglect; and a second count averred that the deceased, "so being such apprentice as aforesaid," was killed by the prisoner by over-work and beating; and the only evidence given to show that the deceased was an apprentice was, that the prisoner had stated that he was an apprentice; Patteson, J., held that there was sufficient evidence to support the second count, but not the first.<sup>4</sup>

§ 139. *Master and servant.* — A master is not ordinarily criminally responsible for a servant's death on the ground that the

<sup>1</sup> *Sellen v. Norman*, 4 C. & P. 80;  
<sup>2</sup> *R. v. Smith*, 8 C. & P. 153.

<sup>3</sup> *R. v. Davies*, 1 Russ. on Cr. 491.

<sup>4</sup> *R. v. Crumpton*, 1 C. & M. 597.

<sup>5</sup> *R. v. Smith*, 8 C. & P. 153.

death would not have occurred if the servant had been properly cared for by the master.<sup>1</sup> But it is otherwise where the servant is in such a state, when under the master's power, as to be unable to apply elsewhere for help.<sup>2</sup>

§ 140. *Jailers, almshouse keepers, and other guardians.*—Whoever assumes the exclusive charge of a helpless person is indictable for manslaughter if he cause the death of such person by withholding the necessaries of life. This rule undoubtedly applies to jailers and almshouse keepers, and persons undertaking the voluntary charge of lunatics.<sup>3</sup> It has been correctly extended in England to a person who undertakes the exclusive nursing and care of another, who is sick or otherwise helpless. An indictment for murder stated that the deceased was of great age, and was residing in the house and under the care and control of the prisoner, and that it was his duty to take care of and find her sufficient meat, &c., and then alleged her death to have been caused by confining her against her will, and not providing her with meat and other necessaries. It appeared that she was seventy-four years of age, and that upon the death of her sister, with whom she had lived, the prisoner, who attended the funeral, took the deceased home with him, saying she was going home to live with him till affairs were settled, and he would make her happy and comfortable; and on another occasion the prisoner had said that in consideration of a transaction, which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived. When the deceased first went to the prisoner's a servant was kept, and the deceased lodged in the back parlor; afterwards she was removed into the kitchen. After some time no servant was kept, and the deceased was waited on by the prisoner and his wife, and she remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together; and on several occasions had complained of being confined; in the cold weather no fire was discernible in the kitchen, and for some time before her death, the deceased was continually locked in the kitchen, and not out of it at all. An undertaker's man stated that, from the appearance of the body, he thought she

<sup>1</sup> R. v. Smith, 8 C. & P. 153. C. C. 449; R. v. Treeve, 2 East P. C.

<sup>2</sup> R. v. Smith, L. & C. 607; 10 Cox 821; R. v. Warren, R. & R. C. C. C. C. 82. See Anon. 5 Cox C. C. 279. 48 n; R. v. Booth, R. & R. C. C. 47 n,

<sup>3</sup> R. v. Porter, L. & C. 394; 9 Cox and other cases cited supra, § 76.

had died from want and starvation. A surgeon proved that the immediate cause of death was water on the brain ; that the appearance of all parts of the body betokened the want of proper food and nourishment, and that there was great emaciation of the body, and that the water on the brain might have been produced by exhaustion. Patteson, J. : " If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased, then he will be guilty of murder ; if, however, you think only that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case ; but it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which she from age and infirmity was incapable of doing. . . . This is the evidence on which you are called to infer that the prisoner undertook to provide the deceased with necessaries ; and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible."<sup>1</sup> But it is necessary that the guardianship should be exclusive.<sup>2</sup> And, as has been already seen,<sup>3</sup> a brother, omitting to supply his idiot brother with food, is not, in default of proof of such exclusiveness, indictable for the omission.<sup>4</sup> It is otherwise if the control be exclusive and absolute.<sup>5</sup>

#### X. MEDICAL MEN.

§ 141. *Negligence in such to omit customary care.* — A physician, who professes to be and is called in as such, is bound to apply to his patient the care and skill which good physicians of his particular school are accustomed to apply under similar circumstances.<sup>6</sup>

§ 142. *Medical man must be competent according to the school*

<sup>1</sup> R. v. Marriott, 8 C. & P. 425, —  
Patteson, J.

<sup>2</sup> R. v. Pelham, 8 Q. B. 959.

<sup>3</sup> Supra, § 74.

<sup>4</sup> R. v. Smith, 2 C. & P. 449.

<sup>5</sup> R. v. Porter, L. & C. 394 ; 9 Cox  
C. C. 449 ; R. v. Edwards, 8 C. & P.  
611. Supra, § 73-4.

<sup>6</sup> Whart. on Neg. § 730.

*he professes.* — He is a specialist, but a specialist only in the kind of practice he professes. Thus a botanic physician, employed as such, is gauged according to the botanic system,<sup>1</sup> and a homœopathic physician according to the homœopathic system.<sup>2</sup>

§ 143. *He is not responsible for honest mistakes or imperfections in discharge of duty such as are incident to all good practitioners and are consistent with the skill and care good practitioners are, under the circumstances, accustomed to exercise.* — If he were, there is scarcely a death for which the attending physician could not be convicted of manslaughter. According to the well known axiom, *imperitia* is to be imputed as *negligentia*; but who, in a science so vast, so complicated in its connections, so uncertain in its boundaries, so fluctuating in its standards, so manifold in its schools, can divest himself of the charge of *imperitia levissima*? Is there not some recess of information to which he has not penetrated, some remedy which he has not tested, some particular possible line of practice with which he has not familiarized himself? So also with regard to the mechanism of his practice. Is there not some instrument, if the case be one in which instruments are required, which might aid the patient, but which he has not procured? Is there not some new mode of nursing by which pain could be mitigated and recovery hastened, but which he has not applied? And then, once more, with regard to his personal attendance. It is possible for a physician never to leave a particular patient; and in such case, if he leave the patient, and mischief thereby ensue, he is guilty of *culpa levissima*. It is no use to say in reply that if he gives all his time to one patient he can give no time at all to other patients. Undoubtedly by thus utterly neglecting his other patients he would be guilty of *culpa lata* towards them; but unless he was thus guilty of *culpa lata* to them, he would be guilty of *culpa levissima* to the patient whom he thus temporarily left. In other words, he must be guilty of *culpa levissima* to each of his patients if he is a physician in general practice; yet, unless he be a physician claiming to practise, he cannot, on the grounds heretofore specified, be chargeable even with *culpa levis*. The only relief from this absurdity is by rejecting the doctrine of *culpa levissima*, and holding the physician specially liable, as is the mandatary and

<sup>1</sup> Bournan v. Woods, 1 Iowa, 441.

<sup>2</sup> Corsi v. Maretzek, 4 E. D. Smith, 1.

agent, only for *culpa levis*; *i. e.* the lack of that diligence which would be exhibited by good physicians of the school and specialty with which he connects himself, when practising in a case similar to that under investigation.<sup>1</sup> He must familiarize himself with the literature of his profession, but this must be according to the opportunities of his place.<sup>2</sup> If, however, he does not possess the skill or apply the care usual among good practitioners under the circumstances, and his patient dies in consequence of his neglect, then he is chargeable with manslaughter.<sup>3</sup>

The burden is on the prosecution to prove negligence.<sup>4</sup>

§ 144. *Not responsible if patient was direct cause of injury.*— If the patient, by refusing to adopt the remedies of the physician, frustrates the latter's endeavors, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctively to himself.<sup>5</sup> At the same time we must remember, to adopt the language of Chapman, C. J., that "a physician

<sup>1</sup> Whart. on Neg. citing *Simons v. Henry*, 39 Me. 135; *Leighton v. Sargent*, 7 Foster, 460; *Carpenter v. Blake*, 6 Barb. 488; *McCandless v. McWha*, 22 Penn. St. 261; *Tefft v. Wilcox*, 6 Kans. 46; *Ritchey v. West*, 23 Ill. 385; *McNevin v. Lowe*, 40 Ill. 210; *Heath v. Gilson*, 3 Oregon, 64; *Hancke v. Hooper*, 7 C. & P. 81. See 2 Wh. & St. Med. J. § 1090-91.

<sup>2</sup> *Carpenter v. Blake*, *ut supra*.

In *McCandless v. McWha*, 22 Penn. St. 261, although there is much said by Judge Lewis inconsistent with this view, the law, as stated by Woodward, J., and Black, C. J., is that a physician is liable only for such skill and diligence as are ordinarily exercised in his profession. "Extraordinary skill, such as belongs only to a few men of rare genius and endowments," is not required, "but that degree which ordinarily characterizes the profession." In Iowa, in 1872, it was held error to charge the jury that a physician was bound to exercise such reasonable skill and diligence as are ordinarily exercised in the profession by thoroughly educated surgeons, hav-

ing regard to the improvements and advanced state of the profession at the time;" and it was held by a majority of the supreme court, that a physician or surgeon was bound only to exercise ordinary skill and diligence, the average of that possessed by the profession as a body, and not of the thoroughly educated only. *Smothers v. Hanks*, 34 Iowa, 287, *Beck, C. J.*, dissenting. But the true rule is, not what the average of a profession would do, but what an intelligent, responsible, and respectable member of the profession would, under the circumstances, do.

<sup>3</sup> *R. v. Spiller*, 5 Car. & P. 333; *R. v. Senior*, 1 Mo. C. C. 346; *R. v. Williamson*, 3 C. & P. 635; *Webb's case*, 1 M. & R. 405; *R. v. Long*, 4 C. & P. 398; *R. v. Whitehead*, 3 C. & K. 202. See *R. v. Chamberlain*, 10 Cox C. C. 486; *R. v. Markuss*, 4 F. & F. 356; *R. v. Macleod*, 12 Cox C. C. 534; 2 Wh. & St. Med. J. § 1058.

<sup>4</sup> *R. v. Bull*, 2 F. & F. 201; *R. v. Spencer*, 10 Cox C. C. 525.

<sup>5</sup> *McCandless v. McWha*, 22 Penn. St. 261; *S. C.* 25 Penn. St. 95.

may be called to prescribe for cases which originated in the carelessness of the patient; and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence, and the separate injury occasioned thereby. The patient may also, while he is under treatment, injure himself by his own carelessness; yet he may recover of the physician if he carelessly or unskillfully treats him afterwards, and thus does him a distinct injury."<sup>1</sup>

§ 145. *No difference between licensed and unlicensed practitioner.* — It was once said in England, that if a physician or surgeon give his patient a potion or plaster, intending to do him good, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure.<sup>2</sup> It was then held that if the medicine were administered or the operation performed by a person not being a *regular* physician or surgeon, the killing would be manslaughter at the least.<sup>3</sup> Thus, in a case decided in 1829, where the prisoner was indicted for manslaughter, it appeared that the deceased had been discharged from the Liverpool Infirmary as cured, after undergoing salivation, and was recommended to go for an emetic, to get the mercury out of his bones, to the prisoner, an old woman who occasionally dealt in medicines, and she gave him a solution of white vitriol or corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland. Bayley, J., said: "I take it to be quite clear that if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one; but he has no right to hazard the consequence in a case where medical assistance may be obtained; if he does so it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another."<sup>4</sup>

§ 146. But the English, and as will presently be seen, the American law now is, that the want of a degree (unless there

<sup>1</sup> Chapman, C. J., *Hibbard v. Thompson*, 109 Mass. 288.

<sup>2</sup> Brit. c. 5; 4 Inst. 251.

<sup>3</sup> R. v. Simpson, Willcock's L. Med.

<sup>4</sup> 4 Black. Com. 197; 1 Hale, 429. Prof. Append. 227.

be a special statute on the subject) adds nothing to the grade of the offence if there be a *bond fide* and honest attempt by the defendant to do his best. Thus, where in a prosecution for malpractice it was proposed to show that the prisoner had had a regular medical education, and that a great number of cases had been successfully treated by him, Hullock, B. (stopping the case), said: "This is an indictment for manslaughter, and I am really afraid to let the case go on lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion that it makes no difference whether the party be a regular or irregular surgeon; indeed, in remote parts of the country many persons would be left to die if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law books<sup>1</sup> have said has been read to you, but they do not state any decisions, and their silence in this respect goes to show what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation; however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Mr. J. Blackstone, and no book in the law goes any further. It may be that a person not legally qualified to practise as a surgeon may be liable to penalties, but surely he cannot be liable to an indictment for felony. It is quite clear you may recover damages against a medical man for want of skill; but as my Lord Hale<sup>2</sup> says, 'God forbid that any mischance of this kind should make a person guilty of murder or manslaughter.' Such is the opinion of one of the greatest judges that ever adorned the bench of this country; and his proposition amounts to this: that if a person, *bond fide* and honestly exercising his best skill to cure a patient, performs an operation which causes

<sup>1</sup> 4 Bl. Com. 197; 1 Hale P. C. 429. <sup>2</sup> 1 Hale P. C. 429.  
429; 4 Inst. 251.



a patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. L. has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vexata quaestio* among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter." <sup>1</sup>

§ 147. Varying but slightly from this case is one of about the same date, in which Lord Ellenborough told the jury: "To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill." <sup>2</sup>

§ 148. It is obvious that the position just taken depends upon the honesty and *bona fides* of the practitioner. Where, however, he is pursuing a plan of bold imposture, the case is otherwise, and this whether he be with or without a degree. The cases that come nearest to the application of this doctrine (though the circumstances did not directly evolve it) are those of St. John Long in England, and Thompson in this country. Two prosecutions against the former are reported. The first was on an indictment for manslaughter by feloniously rubbing, sponging, and washing Miss C. with a certain inflammatory and dangerous liquid. It appeared that two of her family had died of consumption, but that she had enjoyed good health till her mother, Mrs. C., hearing of an assertion of the prisoner that unless Miss C.

<sup>1</sup> R. v. Van Butchell, 3 C. & P. 629, attended the deceased in seven previous confinements with perfect success, and that the deceased wished

<sup>2</sup> R. v. Williamson, 3 C. & P. 635. him to attend her in her last confinement. In addition to the facts above stated, it was proved that the prisoner had

put herself under his care she would die of consumption in two or three months, placed her under his charge. The prisoner was accustomed to rub a mixture on different parts of the bodies of his patients, and this had been applied to Miss C. on the 3d of August by the prisoner's servant, and by his direction. On Friday, the 13th of August, a witness went with Miss C. to the prisoner's, respecting a wound on her back, and Miss C. then "inhaled;" on the next day the prisoner examined her back, and said it was in a beautiful state, and that he would give one hundred guineas if he could produce a similar wound on the persons of some of his patients. His attention being directed to a part of the wound which was of a darker appearance, he stated that this proceeded from the inhaling, and that unless those appearances were produced he could expect no beneficial result. The wound at this time was about five or six inches square. Miss C. was suffering much from sickness, and the prisoner said that it was of no consequence, but on the contrary, a benefit; and that those symptoms, combined with the wound, were a proof that his system was taking due effect. On Sunday, the 15th, Miss C. having got worse, the prisoner said that in two or three days she would be better in health than she had ever been in her life, and spoke very confidently that the result of his system would prolong her life, and that no person could be doing better than she was. At this interview the wound, which had extended, was shown to the prisoner. At the same time he was desired to do something to stop the sickness, but he said he had a remedy in his pocket, which he would not apply, as he knew the sickness had been beneficial; and he also stated on that day, and on Monday, the 16th, that Miss C. was doing uncommonly well. On Tuesday, the 17th, she died. An eminent surgeon proved that on the Monday her back was extensively inflamed as large as a plate, and in the centre was a spot as large as the palm of the hand, black and dead, and in a mortified state, and he thought that some very powerfully stimulating liniment had been applied to her back; that applying a lotion of a strength capable of causing the appearances he saw, to a person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. The appearances on the back were quite sufficient to account for her death. On the most careful examination of the body, after death, no

latent disease or seeds of disease were discovered. It was submitted for the defence that, in point of law, this was nothing like a case of manslaughter, and 1 Hale P. C. 429 ; 4 Bl. C. b. 4, c. 14 ; and *Rex v. Van Butchell*, were cited and relied on. The learned judges who sat in the case at first differed in opinion. Park, J. A. J., said : " I am in this difficulty : I have an opinion, and my learned brother differs from me ; I must, therefore, let the case go to the jury." Garrow, B. : " In *Rex v. Van Butchell*, the learned judge had very good ground to stop the case, as there was no evidence as to what had been done. I make no distinction between the case of a person who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the President of the College of Physicians, the President of the College of Surgeons, or the humblest bone-setter of the village ; but be it the one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages ? Because the parties are bound to have skill, care, and caution. I am of opinion that if a person who has ever so much or so little skill sets my leg, and does it as well as he can, and does it badly, he is excused ; but suppose the person comes drunk and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter ? And why is that ? Because I have a right to have reasonable care and caution." Park, J., in summing up, charged the jury to the following effect : " The learned counsel truly stated in the outset, that whether the party be licensed or unlicensed is of no consequence, except in this respect, that he may be subject to pecuniary penalties for acting contrary to charters or acts of parliament ; but it cannot affect him here." After citing 1 Hale, 429, as an authority in point, the learned judge proceeded : " I agree with my learned brother that what is called *mala praxis* in a medical person is a misdemeanor ; but that depends upon whether the practice he has used is so bad that everybody will see that it is *mala praxis*. The case at Lancaster differs from this case. I have communicated with C. J. Tindal, who tried that case, and he informed me that the man was a blacksmith, and was drunk, and so completely ignorant of the proper steps, that he totally neglected what was absolutely necessary after the birth of the child. That

certainly was one of the most outrageous cases that ever came into a court of justice. I would rather use the words of Lord Ellenborough in *Rex v. Williamson*." (His lordship read them.) "And this is important here, for though he be not licensed, yet experience may teach a man sufficient ; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention?" After setting the authority of Hale P. C. 429, against the dictum of Lord Coke, 4 Inst. 251, and citing the observations of Hullock, B., in *Rex v. Van Butchell*, with approbation, his lordship proceeded: "The refusal by the prisoner to apply the medicine to stop the sickness, although he had it with him, would, in my opinion, if wickedly done, amount to murder ; but he mentioned a case in which sickness had been beneficial. Undoubtedly the result proves a very erroneous opinion on his part, and it seems singular that the restlessness and other circumstances did not awaken apprehension, and call for further measures, but the question again recurs, whether this was an erroneous judgment of a person, who was of general competency, though he unfortunately failed in the particular instance." "With respect to the application of the mixture, if he commanded the servant to use it, it is the same as if he used it himself. Perhaps from the evidence you will think that the act caused the death ; but still the question recurs, as to whether it was done from gross ignorance or criminal inattention. No one doubts Mr. B.'s skill, but that is not quite the question ; it is not whether the act done is the thing that a person of Mr. B.'s great skill would do, but whether it shows such total and gross ignorance in the person who did it, as must necessarily produce such a result. On the one hand, we must be careful and most anxious to prevent people from tampering in physic so as to trifle with the life of man ; and on the other, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case." "If you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty ; if you do not think so, then your verdict will be otherwise."<sup>1</sup>

§ 149. Six months afterwards the same defendant was further tried under a similar charge, though this time before Mr. Baron

<sup>1</sup> R. v. Long, 4 C. & P. 398.

Bayley, Mr. Baron Holland, and Mr. Justice Bosanquet. From the testimony of Captain Lloyd, the husband of the deceased, it appeared that she put herself under the defendant's care on the 6th of October, at which time she was in general good health, to be cured of a complaint she had in her throat. On the 3d she had applied a small blister to her throat, but the wound occasioned by it was nearly well on the 6th. On the 7th, 8th, 9th, and 10th, she went to the prisoner's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th, she was very unwell all the day, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied. On the 12th, the redness on the breast and chest was, if anything, greater. In consequence of the symptoms, the husband went to the prisoner, who asked why Mrs. L. had not come to inhale, and go on with the rubbing; the husband replied it was impossible, she was so ill; she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness; the prisoner said it would soon go off, it was generally the case. He was told of the shivering and chilliness, and that some hot wine and water had been given to relieve her; he said hot brandy and water would have been better, and to put her head under the bed-clothes. He was told that her chest and breast looked very red and very bad; he said that was generally the case in the first instance, but it would go off as she got better, and that the husband need not be uneasy about it, as there was no fear or danger. In the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. In the evening the prisoner came and saw Mrs. L. and looked at her breast, and observing the dressing, said those greasy plasters had no business there, and she ought to have continued the cabbage leaves. She said she could not bear the pain of keeping them on. He then took off his great coat and said that he would rub it out, and turned up the cuff of his coat as if for the purpose of doing so. She exclaimed very much with fright, and expressed

her wonder that he should think of rubbing in the state her breast was in. She asked if there was no way of keeping the leaf on without touching the breast; and he asked her what she wished; she replied to be healed. He said it would never heal with those greasy plasters; that was not the way in which he healed sores. He then asked for a towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said that old linen was the best thing to heal a wound of that kind. She said her skin and flesh were very healthy, and always healed immediately with the simple dressing she had used. He said old linen was better, but she might use the dressing if she liked it; he saw no objection, and, when it skinned over, he would rub it again. He never saw her afterwards; she died on the 8th of November. Mr. Campbell, a surgeon who was called afterwards to visit the deceased, proved that on the 12th of October he found a very extensive wound covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid; the skin was destroyed, the centre of the wound was darker, and in a higher state of inflammation than the other parts; he considered the wound very dangerous to life when he first saw it; the centre spot, and the upper part became gangrenous in about a week; and in his opinion Mrs. L. died of the wound, and according to his judgment it was not necessary or proper to produce such a wound to prevent any difficulty in swallowing, and he did not know of any disease in which the production of such a wound would be necessary or proper. The body was internally and externally in perfect health, except a little narrowness at the entrance of the oesophagus. Mr. Vance, another surgeon, corroborated the testimony of Mr. Campbell, saying that he thought that a man of common prudence or skill would not have applied a liquid, which in two days would produce such extensive inflammation, though all irritating external applications sometimes exceeded the expectations of the medical attendant; but he should say that such conduct was a proof of rashness and of ignorance. Mr. Atley, for the defendant, after examining the sufficiency of the evidence, took the ground that this was not manslaughter, but homicide *per infortuniam*; that the safety of society required a liberal rule, for if a man acting with a good intent is held liable, the knife will tremble in the surgeon's hand; that where the

mind is pure, and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed, which fails, the party is not responsible; and that the indictment, which in substance charged that the death was occasioned by the external application, was not supported. He proceeded to urge that there was no difference in this respect between licensed and unlicensed practitioners. Bayley, B., said: "I agree with Lord Hale, and do not think that there is any difference between a licensed and unlicensed surgeon. It does not follow in the case of either, an act done may not amount to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be laid out of the question in this case. But the manner in which the act is done, and the use of due caution, seem to me to be material. Mr. J. Foster, in his Criminal Law, p. 263, speaking of a person who happens to kill another by driving a cart or other carriage, says: 'If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection*.' And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that there being conflicting authorities, and the impression on our minds not being in your favor, I propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act; for if a man, either with gross ignorance or gross rashness, administers medicine and death ensues, it will be clearly felony." Mr. Atley, for the prisoner, then insisted that in this case, as in larceny, there must be a trespass proved. Trespass was the foundation stone of felony. It was not proved that any fraud had been practised by the prisoner to get the patient under his care; nor had there been any avaricious seeking after fees; if there had been, it might have been evidence to show the existence of trespass. The prisoner's conduct showed his intentions to have been good and honest. In *Rex v. Van Butchell*, the case was stopped because there was no evidence of how the operation was performed, and here there was not any evidence to show the mode in which the application was made. Bayley, B., said:

"In this case we may judge of the thing by the effect produced, and that may be evidence from which the jury may say, whether the thing which produced such an effect was not improperly applied." Bolland, B., said : "When you pass the line which the law allows then you become a trespasser." Mr. Adolphus then took the ground that a party could not be convicted of manslaughter whose intentions were only *helpful*. It was agreed, however, that if the court thought the point had better be reserved, no further observations would be offered. Bayley, B., said : "If I had a clear opinion in your favor, or if my brothers had, or if we had any reason to think that other judges were of a different opinion, it would become our duty to give our opinion here and prevent the case from going to the jury ; but feeling as I do, notwithstanding all I have heard to-day, and myself and my brothers having had our attention directed to the law before we came here, I think it right that the case should go to the jury ; I think that if the jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness ; and I consider that *rashness will be sufficient* to make it manslaughter. As for instance, if I have the toothache, and a person undertakes to cure it by administering laudanum, and says, 'I have no notion how much will be sufficient,' but gives me a cup full, which immediately kills me ; or if a person prescribing James's powder says, 'I have no notion how much should be taken,' and yet gives me a table spoonful, which has the same effect ; such persons acting with rashness will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and *the willingness of the patient cannot take away the offence against the public*." The prisoner on his defence offered considerable evidence of skill, and charged negligence on the attending surgeon. Bayley, B., in his charge to the jury said : "The points for your consideration are, first, whether Mrs. L. came to her death by the application of the liquid ; secondly, whether the prisoner, in applying it, has acted feloniously or not. To my mind it matters not whether a man has received a medical education or not ; the thing to look at is, whether, in reference to the remedy he has used, and the conduct



he has displayed, *he has acted with a due degree of caution*, or, on the contrary, *has acted with gross and improper rashness and want of caution*. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." "If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and that it was the cause of Mrs. L.'s death, then, heavy as the charge against him is, he will be answerable on this indictment for the offence of manslaughter. There was a considerable interval between the application of the liquid and the death of the patient; yet if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say that a different course of treatment by Mr. C. might have prevented it. You will consider these two points: first, of what did Mrs. L. die? You must be satisfied that she died of the wound, which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied of this, whether the application was a felonious application; this will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects in such a manner that it did actually produce them. If you think so then he will be answerable to the full extent."<sup>1</sup> The defendant was acquitted.

§ 150. The same points were discussed on a trial in Massachusetts in 1809, before Sewall, J., and Parker, J., of the supreme court. The defendant, Thompson, was indicted for the murder of Ezra Lovett, by giving him a poison called *lobelia*, of which he died the next day after the dose. On the trial it appeared in evidence that the prisoner, some time in the preceding December, came into Beverly, where the deceased then lived, announced himself as a physician, and professed an ability to cure all fevers, whether black, gray, green, or yellow; declaring that the country was much imposed upon by physicians, who were all wrong if he was right. He possessed several drugs, which he used as medicines, and to which he gave singular names. One he called *coffee*; another *well-my gristle*; and a third *ram-cats*. He had several patients in Beverly and in Salem, previous to Monday,

<sup>1</sup> *R. v. Long*, 4 C. & P. 423 — Bayley and Bolland, BB., and Bosanquet, J.

the second of January, when the deceased, having been for several days confined to his house by a cold, requested that the prisoner might be sent for as a physician. He accordingly came, and ordered a large fire to be kindled to heat the room. He then placed the feet of the deceased, with his shoes off, on a stove of hot coals, and wrapped him in a thick blanket, covering his head. In this situation he gave him a powder in water, which immediately "puked" him. Three minutes after, he repeated the dose, which in about two minutes operated violently. He again repeated the dose, which in a short time operated with more violence. These doses were all given within the space of half an hour, the patient in the mean time drinking copiously of a warm decoction, called by the prisoner his *coffee*. The deceased, after puking, in which he brought up phlegm, but no food, was ordered to a warm bed, where he lay in a profuse sweat all night. Tuesday morning the deceased left his bed, appeared to be comfortable, complaining only of debility, and in the afternoon he was visited by the prisoner, who administered two more of his emetic powders in succession, which puked the deceased, who during the operation drank of the prisoner's *coffee*, and complained of much distress. On Wednesday morning the prisoner came, and after causing the face and hands of the deceased to be washed with rum, ordered him to walk in the air, which he did for about fifteen minutes. In the afternoon the prisoner gave him two more of his emetic powders, with draughts of his *coffee*. On Thursday the deceased appeared to be comfortable, but complained of great debility. In the afternoon the prisoner caused him to be again sweated, by placing him, with another patient, over an iron pan with vinegar heated by hot stones put into the vinegar, covering them at the same time with blankets. On Friday and Saturday the prisoner did not visit the deceased, who appeared to be comfortable, although complaining of increased debility. On Sunday morning, the debility increasing, the prisoner was sent for, and came in the afternoon, when he administered another of his emetic powders with his *coffee*, which puked the deceased, causing him much distress. On Monday he appeared comfortable, but with increasing weakness, until the evening, when the prisoner visited him and administered another of his emetic powders, and in about twenty minutes repeated the dose. This last dose did not operate. The prisoner then admin-

istered pearl-ash mixed with water, and afterwards repeated his emetic potions. The deceased appeared to be in great distress, and said he was dying. The prisoner then asked him how far the medicine had got down. The deceased, laying his hand on his breast, answered *here*; on which the prisoner observed that the medicine would soon get down and unscrew his navel, meaning, as was supposed by the hearers, that it would operate as a cathartic. Between nine and ten o'clock in the evening, the deceased lost his reason, and was seized with convulsion fits; two men being required to hold him in bed. After he was thus seized with convulsions, the prisoner got down his throat one or two doses more of his emetic powders, and remarked to the father of the deceased that his son had got the *hype* like the devil, but that his medicines would fetch him down, meaning as the witness understood, would compose him. The next morning the regular physicians of the town were sent for, but the patient was so completely exhausted that no relief could be given. The convulsions and the loss of reason continued, with some intervals, until Tuesday evening, when the deceased expired. From the evidence it appeared that the *coffee* administered was a decoction of *marsh-rosemary*, mixed with the bark of *bayberry bush*, which was not supposed to have injured the deceased. But the powder which the prisoner said he chiefly relied upon in his practice, and which was the emetic so often administered by him to the deceased, was the pulverized plant familiarly called *Indian tobacco*. A Dr. French, of Salisbury, testified that this plant, with this name, was well known in his part of the country, where it was indigenous, for its emetic qualities; and that it was gathered and preserved by some families, to be used as an emetic, for which the roots, as well as the stalks and leaves, were administered; and that four grains of the powder was a powerful puke. But a more minute description of this plant was given by the Rev. Dr. Cutler. He testified that it was the *lobelia inflata* of Linnæus; that many years ago, on a botanical ramble, he discovered it growing in a field not far from his house in Hamilton; that, not having Linnæus then in his possession, he supposed it to be a nondescript species of the *lobelia*; that by chewing a leaf of it he was puked two or three times; that he afterwards repeated the experiment with the same effect; that he inquired of his neighbor, on whose ground the plant was found, for its

trivial name. He did not know of any ; but was apprised of its emetic quality, and informed the doctor that the chewing of one of the capsules operated as an emetic, and that the chewing more would prove cathartic. In a paper soon after communicated by the doctor to the American Academy, he mentioned the plant, with the name of the *lobelia medica*. He did not know of its being applied to any medical use until the last September, when being severely afflicted with the asthma, Dr. Drury, of Marblehead, informed him that a tincture of it had been found beneficial in asthmatic complaints. Dr. C. then made for himself a tincture, by filling a common porter bottle with the plant, pouring upon it as much spirit as the bottle would hold, and keeping the bottle in a sand heat for three or four days. Of this tincture he took a table-spoonful, which produced no nausea, and had a slight pungent taste. In ten minutes after he repeated the potion, which produced some nausea, and appeared to stimulate the whole internal surface of the stomach. In ten minutes he again repeated the potion, which puked him two or three times, and excited in his extremities a strong sensation like irritation ; but he was relieved from a paroxysm of the asthma, which had not since returned. He had since mentioned this tincture to some physicians, and has understood from them that some patients have been violently puked by a tea-spoonful of it ; but whether this difference of effect arose from the state of the patients, or from the manner of preparing the tincture, he did not know. The solicitor general also stated that before the deceased had applied to the prisoner, the latter had administered the like medicines with those given to the deceased to several of his patients, who had died under his hands ; and to prove this statement he called several witnesses, of whom but one appeared. He, on the contrary, testified that he had been the prisoner's patient for an oppression at his stomach ; that he had taken his emetic powders several times in three or four days, and was relieved from his complaint, which had not since returned. And there was no evidence in the cause, that the prisoner, in the course of his very novel practice, had experienced any fatal accident among his patients. The defence stated by the prisoner's counsel was, that he had for several years, and in different places, pursued his practice with much success ; and that the death of the deceased was unexpected, and could not be imputed to him as a crime. But

as the court were satisfied that the evidence produced on the part of the commonwealth did not support the indictment, the prisoner was not put on his defence. The chief justice charged the jury; and the substance of his direction, and of several observations, which fell from the court during the trial, are for greater convenience here thrown together. As the testimony of the witnesses was not contradicted, nor their credit impeached, that testimony might be considered as containing the necessary facts on which the issue must be found. That the deceased lost his life by the unskilful treatment of the prisoner, did not seem to admit of any reasonable doubt; but of this point the jury were to judge. Before the Monday evening preceding the death of Lovett, he had by profuse sweats, and by often repeated doses of the emetic powder, been reduced very low. In this state, on that evening, other doses of this *Indian tobacco* were administered. When the second potion did not operate, probably because the tone of his stomach was destroyed, the repetition of doses, that they might operate as a cathartic, was followed by convulsion fits, loss of reason, and death. But whether this treatment, by which the deceased lost his life, is or is not a felonious homicide, was the great question before the jury. To constitute the crime of murder, with which the prisoner is charged, the killing must have been with malice, either express or implied. There was no evidence to induce a belief that the prisoner, by this treatment, intended to kill or to injure the deceased; and the ground of express malice must fail. It has been said that implied malice may be inferred from the rash and presumptuous conduct of the prisoner, in administering such violent medicines. Before implied malice can be inferred, the jury must be satisfied that the prisoner, by his treatment of his patient, was wilfully regardless of his social duty, being determined on mischief. But there is no part of the evidence which proves that the prisoner intended by his practice any harm to the deceased. On the contrary, it appears that his intention was to cure him. The jury would consider whether the charge of murder was, on these principles, satisfactorily supported. But though innocent of the crime of murder, the prisoner may on this indictment be convicted of manslaughter, if the evidence be sufficient. And the solicitor general strongly urged that the prisoner was guilty of manslaughter, because he rashly and presumptuously administered to the de-

ceased a deleterious medicine, which in his hands, by reason of his gross ignorance, became a deadly poison. The prisoner's ignorance is in this case very apparent. On any other ground consistent with his innocence, it is not easy to conceive, that on the Monday evening before the death, when the second dose of his very powerful emetic had failed to operate, through the extreme weakness of the deceased, he could expect a repetition of these fatal poisons would prove a cathartic, and relieve the patient; or that he could mistake convulsion fits, symptomatic of approaching death, for a hypochondriac affection. But on considering this point, the court were all of opinion, notwithstanding this ignorance, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter. To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription. And it is not felony, if through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient contrary to his expectation should die. The death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge, or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness at the least, and not of an honest intention and expectation to cure. In the present case there is no evidence that the prisoner, either from his own experience, or from the information of others, had any knowledge of the fatal effects of the *Indian tobacco*, when injudiciously administered; but the only testimony produced to this point proved that the patient found a cure from the medicine. The law thus stated was conformable, not only to the general principles which governed in charges of felonious homicide, but also to the opinion of the learned and excellent Lord Chief Justice Hale. He expressly states,<sup>1</sup> that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure, or

<sup>1</sup> Hale P. C. 429.

prevent a disease, and contrary to the expectation of the physician it kills him, he is not guilty of murder or manslaughter. If in this case it had appeared in evidence, as was stated by the solicitor general, that the prisoner had previously, by administering this *Indian tobacco*, experienced its injurious effects, in the death or bodily hurt of his patients, and that he afterwards administered it in the same form to the deceased, and he was killed by it, the court would have left it to the serious consideration of the jury, whether they would presume that the prisoner administered it from an honest intention to cure, or from obstinate rashness and fool-hardy presumption, although he might not have intended any bodily harm to his patient. If the jury should have been of this latter opinion, it would have been reasonable to convict the prisoner of manslaughter at least. For it would not have been lawful for him again to administer a medicine, of which he had such fatal experience. It is to be exceedingly lamented that people are so easily persuaded to put confidence in these itinerant quacks, and to trust their lives to strangers without knowledge or experience. If this astonishing infatuation should continue, and men are found to yield to the impudent pretensions of ignorant empiricism, there seems to be no adequate remedy by a criminal prosecution, without the interference of the legislature, if the quack, however weak and presumptuous, should prescribe, with honest intentions and expectations of relieving his patients.<sup>1</sup>

§ 151. *Competent skill required irrespective of license.*—

Where a person professes to be a medical man, then he must possess the skill usual among good medical men of his school under the circumstances, and this whether he be licensed or not licensed.<sup>2</sup> Upon an indictment for manslaughter, by causing the death of a child by putting a plaster made of corrosive and dangerous ingredients upon its head, it appeared that the child for eighteen months had been afflicted with scald head, and was taken to the prisoner, who applied two plasters successively all over its head. Two surgeons proved there was a general sloughing of the scalp, which caused the death, and in their opinion this might have been produced by the plasters; there was no evidence to show of what the plasters were composed. Bolland, B.,

<sup>1</sup> *Com. v. Thompson*, 6 Mass. Rep. 134-142.      <sup>2</sup> See *supra*, § 145.

said : " The law as I am bound to lay it down (and I believe I lay it down as it has been agreed upon by the judges ; for cases of this kind have occurred of late more frequently than in former times) is this : if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity." <sup>1</sup>

§ 152. *Careless or ignorant use of dangerous agent is negligence.* — Proof of the administration of dangerous agents by an incompetent person is evidence from which culpable negligence can be inferred.<sup>2</sup> Where the prisoner, a person ignorant and rash, was charged with manslaughter upon an indictment which alleged that he undertook the care and charge of B. K. as a man midwife, and to do everything needful for her during and after the time of her delivery, and that after B. K. was delivered he neglected to take proper care of and to render her proper assistance, by means whereof she died ; Tindal, C. J., said to the jury : " You are to say whether, in the execution of that duty which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of ; and that the death of the person named in the indictment was caused thereby." <sup>3</sup>

And so in a case before Coleridge, J., where the learned judge told the jury that the questions for them to decide were, whether

<sup>1</sup> R. v. Spiller, 5 C. & P. 333 — conram Bolland, B., and Bosanquet, J. See also Lamphier v. Philpot, 8 C. & P. 475, where Tindal, C. J., said : " Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause ; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he

has ; but he undertakes to bring a fair, reasonable, and competent degree of skill." See R. v. Simpson, 1 Lew. C. C. 172 ; R. v. Ferguson, 1 Lewin, C. C. 181.

<sup>2</sup> R. v. Crick, 1 F. & F. 519 ; R. v. Crook, 1 F. & F. 521 ; R. v. Markus, 4 F. & F. 356 ; R. v. Chamberlain, 10 Cox C. C. 486.

<sup>3</sup> Ferguson's case, 1 Lew. 181. If this be the case stated in Long's Cases, the prisoner was a blacksmith, drunk, and wholly ignorant of the proper steps to be taken ; no evidence is stated in Lewin. See 1 Russ. on Cr. 503-4.



the instrument had in this instance caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill, or gross want of attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution. If the jury thought that in this instance the prisoner had used the instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty.<sup>1</sup>

And the same view was taken by Lord Lyndhurst, C. B., shortly afterwards, a qualification being very properly thrown in by which incompetency was not made responsible where the defendant's attendance was actually necessary. In this case the prisoner was indicted for manslaughter in causing the death of R. R., by administering to him a large quantity of Morrison's pills. The deceased being ill of small-pox, had sent for the prisoner, who was a publican and agent for the sale of the pills, and under his advice had taken large quantities of them; his strength gradually wasted under their influence, and on the morning of his death, while in a state of collapse, the prisoner had, of his own accord, administered to him twenty pills. The prisoner had treated the deceased with great kindness during his illness, and on a former occasion the deceased had recovered from a dangerous illness while under the prisoner's treatment. Several medical men gave it as their opinion that medicine of the violent character of which the pills were composed could not be administered to a person in the state in which the deceased was, without accelerating his death. Lord Lyndhurst, C. B., said: "I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as a physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one laboring under disease, and death ensues in conse-

<sup>1</sup> R. v. Spilling, 2 M. & Rob. 107.

quence of that dangerous remedy having been so administered, then he is guilty of manslaughter.<sup>1</sup>

§ 153. *No difference whether the medical man is dealing with a patient as a feed physician or as a volunteer friend.* — Thus, in a case tried before Denman, J., in 1874, the defendant, a physician, was charged with negligently killing his wife by an overdose of muriate of morphine. Judge Denman correctly charged the jury “that it made no difference whether a medical man was dealing with a patient, or, as a volunteer, dealing with a friend, or with his wife.” . . . . “If the drug was administered without want of skill and intending to do for the best, — doing nothing, in fact, that a skilful man might not do, — then if the jury merely thought it was some error of judgment which anybody might have committed, the prisoner should be acquitted.”<sup>2</sup>

[*The question how far the physician's liability is affected by the patient's misconduct, or by other diseases, is discussed infra, §§ 373, 387, 388.*]

§ 154. *Apothecaries and chemists liable on same principles.* — An apothecary's apprentice who is guilty of negligence in delivering medicine, and death ensues in consequence, is guilty of manslaughter. Upon an indictment for the manslaughter of a child, it appeared that the child being ill, the mother sent to a chemist for a pennyworth of paregoric; the chemist's apprentice delivered a bottle, with a paregoric label on it, but with laudanum in it; and the mother, supposing it to be paregoric, gave the child six or seven drops, which killed it. The laudanum bottle and the paregoric bottle stood side by side. Bayley, J., to the jury: “If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him.”<sup>3</sup>

But if the mistake be made under such circumstances as would perplex an ordinarily prudent man, there should be, it seems, an acquittal.<sup>4</sup>

#### XI. PERSONS RUNNING DANGEROUS MACHINERY.

§ 155. *Care must be exercised in proportion to danger.* — It has been already stated that in the use of dangerous instruments

<sup>1</sup> R. v. Webb, 1 M. & R. 405; 2 Lew. 196.

<sup>2</sup> Tessymond's case, 1 Lew. 169; supra, § 92.

<sup>3</sup> R. v. Macleod, 12 Cox C. C. 534.

<sup>4</sup> R. v. Noakes, 4 F. & F. 920; supra, § 92.

care must be applied in proportion to danger.<sup>1</sup> This principle applies both to manufacturers, by whom defective material is used or defective workmanship applied, and to workmen who are guilty of negligence in their application of such powers to practical use. Thus, where the prisoner, who was an iron-founder, was employed to make twelve cannons, to celebrate the passing of the Reform Bill, and four of them were sent home and tried, and one of them burst under the touch-hole, and was sent back to the prisoner, with orders to have it melted up; but the prisoner returned it nailed down to a carriage, and there was some lead in it, which must have been put there to stop up the part that had burst, as it matched the former aperture; and the cannon, being loaded not heavier than usual, burst, and thereby killed the deceased, it was held that the prisoner was guilty of manslaughter.<sup>2</sup>

The jury will be directed, however, to acquit, if the care usual with good workmen under similar circumstances was shown. Thus, where the prisoner was indicted for manslaughter, in having, by negligence in the manner of slinging a cask, caused the same to fall and kill two females, who were passing along the causeway, it appeared that there were three modes of slinging casks customary in Liverpool: one by slings passed round each end of the cask; a second by can hooks; and a third in the manner in which the prisoner had slung the cask which caused the accident, — namely, by a single rope round the centre of the cask. The cask was hoisted up to the fourth story of a warehouse, and, on being pulled endwise towards the door, it slipped from the rope as soon as it touched the floor of the room. Parke, J., in the course of his charge, told the jury: "The double slings are undoubtedly the safest mode; but if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him."<sup>3</sup>

§ 156. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking

<sup>1</sup> *Supra*, § 80.

<sup>2</sup> *R. v. Carr*, 8 C. & P. 168.

<sup>3</sup> *Rigmondon's case*, 1 Lew. 180.

the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in the mines in the neighborhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C. J., said: "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."<sup>1</sup>

§ 157. The deceased was with others employed in walling the inside of a shaft. The defendant was engaged to put a stage over the mouth of the shaft, but from his omission to perform this duty the deceased was killed. The defendant was held on this evidence to be rightfully convicted of manslaughter.<sup>2</sup>

§ 158. The distinction observed in the above cases is pointedly illustrated by the instance already noticed<sup>3</sup> of workmen throwing rubbish from the roof. If this is done in the ordinary course of their business, and a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and if there was even a small probability of persons passing by, it will be manslaughter.<sup>4</sup> It has, indeed, been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution used.<sup>5</sup> But this must be understood with some limitation. If it be done early in the morning, when few or no peo-

<sup>1</sup> Fenton's case, 1 Lew. 179.

<sup>3</sup> Supra, § 99.

<sup>2</sup> R. v. Hughes, D. & B. C. C. 248;

<sup>4</sup> 1 East, 262; Fost. 262.

<sup>7</sup> Cox C. C. 301. See supra, § 80.

<sup>5</sup> R. v. Hull, Kel. 40.

ple are stirring, and the ordinary caution be used, the party may be excusable; but when the streets are full, such ordinary caution will not suffice, for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it.<sup>1</sup>

§ 159. *Careless ventilation of mine.*— A person charged with the proper ventilation of a mine will be guilty of manslaughter if through his negligence an accident occurs which results in death. In an English case, tried in 1847, the first count of the indictment stated that the prisoner, in and upon one James Shakespeare did make an assault; and that it was the duty of the prisoner to ventilate and cause to be ventilated a certain coal mine, and to cause it to be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be kept ventilated, and that the noxious gases accumulated and exploded, whereby the said J. S., who was lawfully in the said mine, was killed. It appeared that a mine, called Round Green Colliery, situate at Hales Owen, was the property of George Parker, Esq., and that the prisoner was a sort of manager of it, and called the ground bailiff; that another person was under him, called the butty, he being a sort of foreman; and that the deceased, who was called the doggy, was a kind of second foreman under the butty. It further appeared, that, at about half past six o'clock on the morning of the 17th of November, 1846, a number of men were working in a large chamber in the colliery, when there was an explosion of fire-damp, by which nineteen persons, including the deceased James Shakespeare, were killed; and it was imputed, on the part of the prosecution, that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. But it was sought to be shown by the cross-examination of the witnesses for the prosecution, that it was the duty of the butty (who was one of the persons killed by the explosion) to have reported to the prisoner as ground bailiff that an air-heading was required; and that as far as appeared, he had not done so. For the prisoner it was submitted, first, that the prisoner was not guilty of any negligence at all, as it was only his duty to cause air-headings to be put up on the requisition of the butty; and, secondly, that a person who was guilty only of breach of duty by omission could not be found guilty of manslaughter; for that, in order to constitute

<sup>1</sup> Foxt. 263. And see Whart. on Neg. § 839; supra, § 81.

that offence, there must be some wrongful or improper act done by the prisoner, except in those cases where there was a liability known to the law, such as providing an infant with food, or the like. Maule, J. (in summing up): "The prisoner is charged with manslaughter, and it is imputed that in consequence of his omission to do his duty a person named Shakespeare lost his life. It appears that the prisoner acted as ground bailiff of a mine, and that, as such, his duty was to regulate the ventilation, and direct where air-headings should be placed; and the questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect. Still, assuming that to be so, their neglect will not excuse the prisoner; for, if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who is negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them."<sup>1</sup>

§ 160. *Deserting post.* — For a person charged exclusively with dangerous machinery to desert without notice and leave an incompetent substitute in his place, makes him liable for death caused by the incompetency of such substitute.<sup>2</sup> But a person so leaving machinery is not liable for injuries caused by the interposition of an independent responsible agent.<sup>3</sup>

## XII. PRIZE FIGHTERS, AND PERSONS ENGAGED IN ATHLETIC SPORTS.

§ 161. *Prize fighters liable for manslaughter in case of non-malicious killing of antagonist.* — On the same principle that parties engaged in a duel are guilty of murder if death ensue, so persons engaged in prize fighting with the same result are guilty of manslaughter. The difference between the cases is simply

<sup>1</sup> R. v. Haines, 2 C. & K. 368.

<sup>2</sup> R. v. Hilton, 2 Lewin C. C. 214.

<sup>3</sup> R. v. Lowe, 3 C. & K. 123; 4 Cox C. C. 449.

that of *intent*. In the first instance, there is an intent to take life ; in the second, an intent merely to do an unlawful act not amounting to felony. But if, in prize fighting, a party goes out with an original intent to do grievous bodily harm to his antagonist, and slays him, the offence is murder at common law, or murder in the second degree under the American statutes. And so if he goes with the intention to *kill*, no matter what may have been the *motive*, the offence is murder. If, however, the guilty intent arises in hot blood, in the excitement of the struggle, and without the intervention of cooling time, the offence is but manslaughter, and under ordinary circumstances, all persons encouraging a prize fight in which death ensues are accessaries to manslaughter. Thus, where it appeared that there was a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence, and the deceased died in consequence of blows received on this occasion, and for the prisoner it was attempted to be proved, that though he was present during the fight, yet he neither did nor said anything. Littledale, J., said : " If the prisoner was at this fight encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it. My attention has been called to the evidence of those witnesses who have said that the prisoner did nothing ; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence ; I mean if they remained present during the fight. I say that if they were not casually passing by, but staying at the place, they encouraged it by their presence, although they did not say or do anything. This is my opinion of the law of this case. However, you ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself ; for if he came by his death by any means not connected with the fight itself, that is, if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of the combatants, then persons merely present encouraging the fight would not be answerable, unless they are connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of

manslaughter; but if the death ensued from violence unconnected with the fight itself, that is by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter.”<sup>1</sup>

§ 162. *And so of participants in unlawful sports.* — When death occurs as an incidental consequence of an unlawful sport, it is manslaughter in all concerned in promoting the act which immediately caused the death. This principle has been applied in England to all present encouraging not only boxing matches but other sports of a similar kind, which are exhibited for lucre, on the ground that they tend to encourage idleness by drawing together a number of disorderly people, and hence involve a criminal responsibility.<sup>2</sup> In such cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace.<sup>3</sup> Nor does provocation operate to acquit. Thus, in a case of old date, where the prisoner had killed his opponent in a boxing-match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden.<sup>4</sup>

So the English custom of cock-throwing, at Shrovetide, has been considered unlawful and dangerous; and accordingly, where a person throwing at a cock missed his aim, and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and, speaking of the custom, he says: “It is a barbarous, unmanly custom, frequently productive of great disorders, dangerous to the bystanders, and ought to be discouraged.”<sup>5</sup> So throwing stones at another wantonly in play, being a dangerous sport, without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter.<sup>6</sup>

<sup>1</sup> R. v. Murphy, 6 C. & P. 103; R. v. Young, 8 C. & P. 844; and see § 319, 479.

<sup>2</sup> Fost. 260.

<sup>3</sup> 1 East P. C. c. 5, s. 42, p. 270.

<sup>4</sup> Ward's case, 1 East, 270.

<sup>5</sup> Fost. 261.

<sup>6</sup> 1 Hawk. P. C. c. 29, s. 5. See *infra*, § 479.



§ 163. *But not so in lawful athletic sports. No responsibility for death which is an incidental consequence of the game, unless there be malice.*—The Roman law gives us the following illustration of this principle: “Si quis in collectatione vel in pancratio vel pugiles dum inter se exercentur alius alium occiderit, siquidem in publico certamine alius alium occiderit, cessat Aquilia, quia gloriæ causa et virtutis, non injuriæ gratia videtur damnum datum. Hoc autem in servo non procedit, quoniam ingenui solent certare: in filio fam. vulnerato procedit: plane si cedentem vulneraverit erit Aquiliæ locus.”<sup>1</sup> In other words, no liability attaches to the wounding or killing (if the rules of the game are preserved and no malice shown) of a freeman in a wrestling match or other public game. While the trial of strength continues, it is one of the rules of the game that each party exerts all the strength at his command; and each party goes into the game with full notice that this will be done. When, however, the game is ended, then the conqueror must exhibit *diligentia* in his treatment of his prostrate antagonist. And the game, to enable this defence to be taken, must be a *bond fide* match, *gloriæ et virtutis causa*. A wrestling match with a slave does not fall under this head; it was no “gloria” to overcome a slave in such a trial. It was otherwise, so argues Pernice,<sup>2</sup> a leading authority in this branch of the law, with the game of ball, as appears by the following extract: “Cum pila complures luderent quidam ex his servulum cum pilam percipere conaretur impulit: servus cecidit et crus fregit. Quaerebatur: an dominus servuli lege Aq. cum eo cujus impulsu ceciderat agere potest? Respondi non posse, cum casu magis quam culpa videretur factum.”<sup>3</sup> Here the presumption indicates *casus*. In this case, however, the game is not limited to the *ingenui*. The case is therefore one in which slave and freeman stood alike; the one having no greater privilege than the other. But here, from the nature of the game, the idea of *diligentia* is excluded; the players of one side seeking to hinder the players of the other side from catching the ball, and a struggle therefore accepted which cannot go on without the risk of bruises and falls. In such case a hurt received in the usual course of the game cannot be regarded as *culpa*. In games, therefore, which are sanctioned by long usage and by in-

<sup>1</sup> L. 7. § 4. leg. Aq.; Pernice, p. 54.<sup>2</sup> L. 52. § 4. D. h. t.<sup>3</sup> Op. cit. p. 54.

direct if not direct legal sanction, there is no application of the maxims *Lusus quoque noxius in culpa est*,<sup>1</sup> and *Non debet esse impunitas lusus tam perniciosus*.<sup>2</sup>

Hence we may conclude that all who take part in lawful athletic games, and fairly follow the rules belonging to such games, are not responsible for deaths incidentally resulting therefrom.<sup>3</sup> But it is otherwise if the weapons used are of a dangerous and unsuitable character, and are employed with recklessness which leads to death: the offender, in case of death, is guilty of manslaughter. Thus, in an early English case, the evidence was that Sir John Chichester made a pass at his servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword.<sup>4</sup> This was adjudged manslaughter: and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm.<sup>5</sup> But, notwithstanding these high authorities, it may now be questioned whether, in this case, the application of the principle is as correct as the principle itself. If the practising of this kind in fencing — which was the sport in which Sir John Chichester was engaged — is lawful, it would seem that the bursting of the sword through the chape of the scabbard was mere misadventure. The design of the scabbard is to render the sword harmless, and a man who carries his sword about his person assuredly gives the best evidence in his power of his confidence in the sufficiency of the guard. If it is lawful to carry such a weapon, it assuredly is lawful to use it when properly guarded from mischief. The whole question, therefore, turns on the point, whether the particular exercise in which Sir John Chichester was engaged was one likely to disengage the sword from the scabbard.<sup>6</sup>

<sup>1</sup> L. 10. § 4 D. leg. Aq.

<sup>2</sup> L. 50. § 10. D. h. t.

<sup>3</sup> See *Penn. v. Lewis*, Addison, 270;

Fenton's case, 1 Lew. 179; Whart. Cr. L. 7th ed. § 1012.

<sup>4</sup> 1 Hale, 472.

<sup>5</sup> 1 Hale, 473; Fost. 260.

<sup>6</sup> See *infra*, § 479.

§ 164. *In practical jokes responsibility attaches.* — But where the death occurs not as incident to a game whose risks all the participants know in advance, but as the result of a practical joke which was a surprise on the deceased, then, though there was no malice, the defendant is responsible for manslaughter, when the death is imputable to physical agencies put in motion by himself. In accordance with this view it has been held manslaughter to cause death by ducking another;<sup>1</sup> by building a fire round a drunken man in order to frighten him, he afterwards rolling into the fire, which was not placed so near as to endanger him if he had laid still;<sup>2</sup> by shooting with a gun, though for the mere purpose of alarming;<sup>3</sup> by throwing stones into a coal pit in sport;<sup>4</sup> by upsetting a cart as a joke;<sup>5</sup> by administering, as a joke, excessive quantities of intoxicating liquor.<sup>6</sup>

### XIII. CORRECTION BY PERSONS IN AUTHORITY.

§ 165. *Killing by immediate correction, manslaughter.* — When death ensues, in consequence of correction by parents, masters, and others having lawful authority, and such correction is considered nothing more than reasonable, the death will be treated as accidental.<sup>7</sup> Where, however, the correction exceeds the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to the circumstances. If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter;<sup>8</sup> if with a dangerous weapon, likely to kill or maim, and with cruelty, it will be murder; due regard being had in both in-

<sup>1</sup> 1 East P. C. 236.

<sup>2</sup> R. v. Errington, 2 Lew. 217.

<sup>3</sup> State v. Roane, 2 Dev. 58.

<sup>4</sup> Fenton's case, 1 Lewin, 179; supra, § 136.

<sup>5</sup> R. v. Sullivan, 7 C. & P. 641. In this case a carman was in the front part of a cart, loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the cart, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been

taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received. It was held that as the intent was to commit a mere trespass, the boy was guilty of manslaughter.

<sup>6</sup> R. v. Martin, 3 C. & P. 211; R. v. Packard, 1 C. & M. 246.

<sup>7</sup> 1 East P. C. 261; supra, § 134.

<sup>8</sup> Anon. 1 East P. C. 261.

stances to the age and strength of the party.<sup>1</sup> So, as was said in a case already cited, if a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who notwithstanding compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast, and is drowned thereby, and his death is occasioned by such misconduct in the master; under such circumstances it is murder in the master. If there be no malice in the master, the crime is reduced to manslaughter.<sup>2</sup> So if a father, without malice, beats his son for theft so severely with a rope that he dies, it is only manslaughter; if with malice, it is murder.<sup>3</sup> And so for a person *in loco parentis* to cruelly overwork a child, producing its death.<sup>4</sup>

A schoolmaster who, on a boy's return to school, wrote to his parent, proposing to beat him severely, in order to subdue his alleged obstinacy, and on receiving his father's reply, assenting thereto, beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, is guilty only of manslaughter, no malice being proved.<sup>5</sup>

<sup>1</sup> Fost. 262; Kel. 28, 133; 1 Hale, 454, 457, 473, 474; 1 Hawk. c. 29, s. 5; 1 Leach, 378; R. v. Conner, 7 C. & P. 438; R. v. Cheeseman, 7 Car. & P. 455; State v. Harris, 63 N. C. 1.

<sup>2</sup> U. S. v. Freeman, 4 Mason C. C. R. 505.

<sup>3</sup> Anon. 1 East P. C. 261; supra, § 184, infra, § 304.

<sup>4</sup> R. v. Cheeseman, 7 C. & P. 455; see 2 Twiss's Lord Eldon, 36; supra, § 136.

<sup>5</sup> R. v. Hopley, 2 F. & F. 202. See Com. v. Randall, 4 Gray (Mass.), 36.

## CHAPTER V.

### STATUTORY DISTINCTIONS.

Old English law indifferent to gradations of guilt, § 170.	And so of killing by poison or lying in wait, § 186.
American legislation establishing such gradations in homicide, § 171.	Unintentional killing when attempting unenumerated felony is manslaughter, § 188.
General analysis of statutes, § 173.	"Attempt" to commit enumerated felony means indiotable attempt, § 189.
Construction of New York statutes, § 174.	Murder in second degree includes all common law murders in which the intent is not to take life, including cases in which the mind is in such a state as to be incapable of specific intent, § 190.
Construction of Pennsylvania and cognate statutes, § 175.	So in drunkenness, § 191.
"Wilful" and "deliberate" descriptive of first degree, § 176.	Also includes killing in production of abortion when intent is seriously to hurt, § 192.
"Specific intent to take life" the characteristic of first degree, § 177.	Murder in second degree a compromise courts are unwilling to disturb, § 193.
"Wilful" means specifically willed, § 178.	Mere malicious killing only presumed to be murder in second degree, § 194.
"Deliberate" to be regarded as qualifying "killing," § 179.	Common law indictment sufficient under statutes, § 195.
"Premeditated" does not require positive proof of antecedent intent, which may be inferred, § 180.	Under such indictment verdict may be for either degree, § 196.
Facts from which premeditation can be inferred, § 181.	Verdict must designate degree, § 197.
When A. intending to kill B. shoots C., offence is murder in first degree, § 182.	Right of judge to direct verdict, § 198.
Where A. shoots at a body of men, intending to kill either of them, offence is murder in first degree, § 183.	
Killing in perpetration of specified felony not necessarily murder in first degree, § 184.	

§ 170. *Old English law indifferent to gradations of guilt.*—According to the older common law authorities, not only was it murder to kill another, though the intent was merely to severely hurt, but homicide unintentionally committed in pursuit of a felony was murder, and was punishable with death. It is true that so long as death was the common punishment for all felonies, its infliction in this instance attracted comparatively little attention. But in this country, when capital punishment, generally speaking, was restricted to homicides, the injustice of taking life for what might, after all, be a mere species of misadventure, early attracted attention. No objection was taken to the common law distinction between murder and manslaughter.

The general view was that it was proper that this should remain. The question was one of *punishment*. It was felt that there was a large class of cases falling under the general head of murder, in which a jury ought to be allowed to say whether there was an intent to take life or not, and where no such intent was found, it seemed consistent with sound jurisprudence that a sentence lighter than death should be inflicted. And it was to meet this class that legislative action was invoked.

§ 171. *American legislation directed to the establishment of degrees.* — Pennsylvania was the first state to move; and on April 22, 1794, passed an act which has now been in substance incorporated in the codes of a majority of the states of the Union. That the object of the act was to diminish the area of cases to which the penalty of death is applicable, is obvious from the first clause. "Whereas," it recites, "the design of punishment is to prevent the commission of crime, and to repair the injury that has been done thereby to society, or the individual; and it hath been found by experience that these objects are better obtained by moderate, but certain penalties, than by severe and excessive punishments; and whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, *and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety*; therefore, no crime whatsoever, hereafter committed, except murder in the first degree, shall be punished with death in the State of Pennsylvania."

Then follows the operative clause: —

"And whereas the several offences which are included under the general denomination of murder differ so greatly from each other in the degree of atrociousness, that it is unjust to involve them in the same punishment: All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of wit-

nesses, to determine the degree of crime, and to give sentence accordingly."

§ 172. Massachusetts presents another line of distinction, and in this respect is followed by several other states. The Massachusetts statute makes murder in the first degree to consist of murder "with deliberately premeditated malice aforethought;" and of murder "in the commission of, or in an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty." The Massachusetts courts, following this definition, have, as will be seen, laid greater emphasis on the "premeditation" being "deliberate," and less on the specific character of the intent, than have the courts in Pennsylvania.

§ 173. *General analysis of statutes.* — By the following analysis the distinctive features of the statutes of several states can be seen at a glance:—

## MURDER IN THE FIRST DEGREE.

	ENUMERATED INSTANCES.	GENERAL DEFINITION.
<i>Maine</i> . . .	Murder "in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years."	Murder with "express malice aforethought."
<i>New Hampshire</i>	Murder by "poison, starving, torture," or "in the perpetration or attempt at the perpetration of arson, rape, robbery, or burglary."	Murder by "deliberate and premeditated killing."
<i>Massachusetts</i> .	Murder "in the commission of or in an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty."	Murder "committed with deliberately premeditated malice aforethought."
<i>New York</i> . .	Murder "when perpetrated without any design to effect death by a person engaged in the commission of any felony."	Murder "first, when perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. Second, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." <sup>1</sup> "Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, shall be murder in the second degree when perpetrated intentionally, but without deliberation and premeditation." <sup>1</sup>

<sup>1</sup> Act of May 29, 1873.

	ENUMERATED INSTANCES.	GENERAL DEFINITION.
<i>Pennsylvania</i> .	Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary."	Murder perpetrated "by any other kind of wilful, deliberate, and premeditated killing."
<i>Connecticut</i> .	<i>Ibid.</i>	<i>Ibid.</i>
<i>New Jersey</i> .	<i>Ibid.</i>	<i>Ibid.</i>
<i>Michigan</i> .	<i>Ibid.</i>	<i>Ibid.</i>
<i>Alabama</i> .	<i>Ibid.</i>	<i>Ibid.</i>
<i>Virginia</i> .	Murder by "poison, by lying in wait, imprisonment, starving, or by wilful, deliberate, and premeditated killing, or other cruel treatment or torture," or in "the commission of or attempt to commit any arson, rape, robbery, or burglary."	<i>Ibid.</i>
<i>Tennessee</i> .	Murder committed "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or larceny."	Murder perpetrated "by any (other) kind of wilful, deliberate, malicious, and premeditated killing."

§ 174. *Construction of New York statute.*—The act of May 29, 1873, of which an analysis is given above, is of too recent a date to have received the benefit of deliberate judicial interpretation. So far as concerns some of its terms, such interpretation is necessary to settle its meaning. For one imaginable case of homicide (*i. e.* when a person kills another, "when in the commission of any felony," but with a "design to effect death," yet without such design being "deliberate and premeditated," or "evincing a depraved mind, regardless of human life"), it apparently provides no punishment; and it is easy also if we are to take, as the statute requires us, to refining on this topic, to conceive of other cases of homicide, which are more than "intentional," yet less than "deliberate and premeditated," and to which the statute does not reach. Putting aside these questions, however, and dismissing the subtleties that are involved in the distinction taken by the legislature between "intent" and "premeditation," we may take the meaning of the statute to be this: When murder is committed (aside from the enumerated instances) without "a depraved mind, regardless of human life," "by any act imminently dangerous to others," with an intent suddenly formed, it is murder in the second degree; if with an intent deliberately formed, it is murder in the first degree.<sup>1</sup>

§ 175. *Construction of Pennsylvania and cognate statutes.*—These statutes cannot now be charged with ambiguity. They have been in force in Pennsylvania and Virginia for over eighty

<sup>1</sup> See to this effect charge of Davis, 1, 1873; 8 Albany L. J. 19. See 7 J., in *People v. Walworth*, N. Y. July *Ibid.* 228.



years; they were adopted in other states at the earliest periods of legislation; and they have received a definite and settled judicial exposition which will be now given.

§ 176. "*Wilful and deliberate, and premeditated killing*" is a general description of the first degree.—The general expression, "any kind of wilful and deliberate, and premeditated killing," is to be separated from the context, and to be so interpreted as to constitute a distinct and substantive definition. "The counsel for the prisoner," said a learned judge, in a case before the general court of Virginia, "has supposed, and argued in support of his supposition, that the words, 'any other kind of wilful, deliberate, or premeditated killing' ought to be construed, and of necessity, as referring to the character or kind of killing, or murder specified in the previous enumeration (by means of poison, lying in wait, duress of imprisonment or confinement, starving, wilful, malicious, or excessive whipping, beating, or other cruel torture), as if it read, 'any other kind of such wilful, deliberate, or premeditated killing;' because, otherwise, as he supposes, the preceding particular enumeration would be useless. Now, a plain and invincible answer to this argument is the import of the terms used,—other and such. Other killing, means any other whatever which is different from the same; such killing would refer to the modes of killing enumerated, and confine itself to the kind of killing enumerated, and the means by which it was effected. To admit this construction of the prisoner's counsel, would be to allow that the legislature meant nothing, or did not understand what it meant, when it used, upon this very important subject of life and death, those words of plain and obvious import, 'any other kind of wilful, deliberate, and premeditated killing.' This is what this court cannot admit. Poison may reach the life of one or more not within the design of him who lays the bait; lying in wait may be with a view of great injury, abuse, and bodily harm, without the settled purpose to kill; imprisonment, or confinement, or starving, may be with a view to reduce the victim to the necessity of yielding to some proposed conditions, as well as a punishment for the failure of prompt obedience, without any fixed determination to destroy life; and the same may be said of malicious or excessive whipping, beating, or other cruel torture. In all these enumerated cases, the legislature has declared the law, that the perpetrator

shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result which the will, deliberation, and premeditation of the party accused sought. And the same authority has declared the law, that any other kind of killing, which is sought by the will, deliberation, and premeditation of the party accused, shall also be murder in the first degree; but as to this other kind of killing, proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought. But to this general rule the same authority adds an exception, which is, that any death consequent upon the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other murder at common law shall be deemed murder in the second degree. So that the cases within the exception as now put, and the cases enumerated as first mentioned are, in fact, placed upon the same principle; there is no necessity of proof in either to establish the fact, that a homicide was intended. And it follows, of course, that all other homicide which was murder at common law is now murder in the second degree, except when it shall be proved that the homicide was the result of a 'wilful, deliberate, and premeditated killing;' and it also follows, of necessity, that when by the proof the mind is satisfied that the killing was wilful, deliberate, and premeditated, such killing must be taken and held to be murder in the first degree." <sup>1</sup>

§ 177. *The general definition of the statutes does not touch the common law distinction between murder and manslaughter; it simply divides murder into two classes: murder with a specific, deliberate intent to take life being murder in the first degree; murder without such an intent to take life being murder in the second degree.* — By the general concurrence of each of the states in which this distinction has been the subject of examination, the practical working of the statutes has been to divide murder, as limited by the common law, into two classes, leaving the original boundaries between murder and manslaughter unaltered. The statutes, it has been held, in requiring murder in the first degree to be deliberate, do not change the common law

<sup>1</sup> *Com. v. Jones*, 1 Leigh, 610-612, Virg. Cases, 488; *Whiteford's case*, per Judge Daniel; *Burgess's case*, 2 cited 1 Leigh, 612.

doctrine in that respect with regard to murder; the degree of deliberation requisite in both degrees being the same. The distinctive peculiarity attached by the statutes to murder in the first degree, however, is that it must necessarily be accompanied with a premeditated intention to take life. The "*killing*" must be "*premeditated*." Wherever, then, in cases of deliberate homicide, there is a specific intention to take life, the offence, if consummated, is murder in the first degree; if there is *not* a specific intention to take life, it is murder in the second degree.<sup>1</sup> "To constitute murder of the first degree,<sup>2</sup> the intent of the party killing must have been to take life; whereas, by the common law, if the mortal blow is malicious and death ensues, the perpetrator is guilty of murder, whether such an intention does or does not appear to have existed in his mind. The injury being malicious, the common law holds the offender responsible for all the consequences following his unlawful act. The first inquiry, therefore, of a Pennsylvania jury, after a felonious and malicious homicide is established, not committed by means of poison, or lying in wait, or in the perpetration of one of the felonies enumerated in the act, is whether the mortal blow was given with an intent to take life, or merely to do great bodily harm. If the former

<sup>1</sup> Resp. v. Bob, 4 Dallas, 146; Penn. v. Honeyman, Addison, 148; Penn. v. Lewis, Addison, 288; Com. v. Green, 1 Ashmead, 289; Com. v. Murray, 2 Ashmead, 41; Com. v. Daley, Appendix; Com. v. Hare, Appendix; Com. v. Gable, 7 Serg. & R. 428; Kelly v. Com. 1 Grant, 484; Com. v. Drum, 58 Penn. St. 9; Bennett v. Com. 8 Leigh, 745; Slaughter v. Com. 11 Leigh, 681; Com. v. King, 2 Va. Cas. 78, in note; Whiteford v. Com. 6 Randolph, 721; Burgess's case, 2 Va. Cas. 483; Com. v. Jones, 1 Leigh, 610; Dale v. State, 10 Yerger, 551; Mitchell v. State, 5 Yerger, 340; State v. Anderson, 2 Tenn. R. 6; Dains v. State, 2 Humph. 439; Anthony v. State, 1 Meigs, 265; Swan v. State, 4 Humph. 136; Com. v. Crause, 3 Amer. Law Jour. 299; Clark v. State, 8 Humph. 671; Riley v. State, 9 Humph.

646; State v. Spencer, 1 Zabriskie, 196; State v. Shultz, 25 Mis. (4 Jones) 128; People v. Potter, 5 Mich. 1; State v. Hicks, 27 Missouri (6 Jones), 588; People v. Josephs, 7 Cal. 129; People v. Barry, 31 Cal. 357; State v. Starr, 38 Mo. 270; Warren v. State, 4 Cold. 130; Bratton v. State, 10 Humph. 108; Com. v. Dougherty, 1 Browne, App. p. 18.

<sup>2</sup> King, P. J., in Com. v. Daley, Whar. on Hom. 466, as afterwards adopted by Rogers, J., in the supreme court, in Com. v. Sherry, Appendix. See criticism on this definition in Atkinson v. State, 20 Texas, 522, where, under a similar statute, it was held that to constitute murder in the first degree, some degree of prior deliberation must be shown. This subject has been already discussed in its general bearings. See supra, § 18-34.

is proved by the evidence, the crime is murder in the first degree ; if such an intent does not satisfactorily appear, the jury should return a verdict of murder in the second degree."

§ 178. "*Wilful*" means *specifically willed*. — The doubt which arises from the use of this term has already been noticed. Can an *unintended* act be said to be wilful, and if so, can the homicide of one party when another was intended, be such ? It has been seen that on this point there exists some conflict of authority. Keeping in view the severity which the construction of a penal statute requires, and recollecting that the term as used in this case was meant to be restrictive, the better view seems to be that in order to bring a homicide within the act, it must have been specifically *willed* by the perpetrator. It is difficult to see how if an unintended homicide be within the terms of the act, any other kind of murder with a collateral felonious intent can be excluded.

§ 179. "*Deliberate*" to be regarded as qualifying "*killing*." — That species of homicide, which is the result of justly provoked passion, falls at common law under the head of manslaughter, and of course is out of the question here. But there are many cases of murder at common law which are *indeliberate*. Putting aside homicides perpetrated in pursuance of a collateral felonious intent, which have already been considered, we have those cases where the intellect is so confused by drink or stimulus, or by undue, and yet not homicidal passion, as to be incapable of deliberation. These cases are all murder at common law, but it would seem that they want the essential features of deliberation to make them murder under the statutes before us. Under these statutes the deliberation must be "to take life."

§ 180. "*Premeditated*" does not require positive proof of an intent prior to the commission of the act, as such prior intent may be inferred from the act. — It has been said that a positive previous intent to take life must be shown,<sup>1</sup> but this opinion has since been recalled by the court that delivered it,<sup>2</sup> and is opposed to the weight of authority elsewhere. And it has also been said that when the fact of death alone is proved, the presumption is that it is murder in the second degree, it being incumbent on the prosecution to rebut this by something, however slight, from

<sup>1</sup> Mitchell v. State, 5 Yerger, 340.

<sup>2</sup> State v. Andrews, 2 Tenn. 6 ; Dale v. State, 10 Yerg. 551.

which premeditation can be inferred.<sup>1</sup> But be this as it may — and when analyzed the position varies very little from that of the crown writers on murder, who draw the presumption of malice aforethought, not from the fact of death, but from the nature of the wound, instrument, &c. — there is a general concurrence of authority on the general meaning of *premeditation*. It involves a prior intention to do the act in question. It is not necessary that this intention should have been conceived for any particular period of time.<sup>2</sup> It is as much premeditation, if it be entered into the mind of the guilty agent a moment before the act, as if it entered ten years before.<sup>3</sup> And the reason of this is ob-

<sup>1</sup> Hill's case, 2 Gratt. 594; *State v. Turner*, Wright, 80. See *infra*, § 194.

<sup>2</sup> *Supra*, § 32; *Whiteford v. Com.* 6 Rand. 721; *Keenan v. Com.* 44 Penn. St. (8 Wright) 647; *Warren v. Com.* 36 Penn. St. (1 Wright) 45; *State v. Dunn*, 18 Mo. 419; *State v. Jennings*, 18 Mo. 435; *Kilpatrick v. Com.* 7 Casey, 138; *Donnelly v. State*, 2 Dutch. (N. J.) 463; *McKenzie v. State*, 26 Ark. 334; *State v. Holmes*, 54 Mo. 153. In Indiana, the statute is construed to require that a prior conception should be proved or inferred to have been formed by the defendant prior to the act. *Fahnestock v. State*, 23 Ind. 231; but this does not differ from the view of the text. In Texas, the view of the text, is vigorously combated. *Atkinson v. State*, 31 Tex. 440; *Ake v. State*, 30 Tex. 466; *S. C.* 31 Tex. 416. So also *Craft v. State*, 3 Kansas, 450.

<sup>3</sup> This is lucidly shown in a case in New York, where the learned judge, delivering the opinion of the court, said: "Malice prepense, however, had attained a broader meaning than belongs to the term premeditated design. The intent to take life was not necessary to constitute malice prepense. Even express malice, or malice in fact, is defined to be a deliberate in-

tention of doing *any* bodily harm to another, unauthorized by law (Hale P. C. 451), and by no means necessarily involved an intent to take life. The change, therefore, which the statute has effected, by substituting the word design in place of malice, is not to alter the nature or design of premeditation requisite in the crime of murder, but to require — which the common law did not require — the existence of an actual intention to kill, to constitute that crime under the first sub-division of the fifth section. This view of the law is well sustained by the decisions in those states where the crime of murder has been distinguished by statute into murder in the first and second degrees. In those states, wilful, deliberate, and premeditated killing is murder in the first degree. The cases are very ably reviewed in Wharton's Am. Crim. Law (2d ed.), 420, *et seq.*, and the clear result of them is, that in cases of deliberate homicide, where there is a specific intention to take life, the offence, if consummated, is murder in the first degree. The degree of deliberation is not different from that required by the common law. As was said by Chief Justice McKean in *Res. v. Bob*, 4 Dal. 146, 'the intention remains as much as ever the true criterion of crime, in law as well as in

vious. In the first place, if, in order to make murder in the first degree, it be necessary the idea should be proved to have been conceived a week or a day ahead, there will be no murder in the first degree at all, for the guilty party will take care that the conception be concealed until the limitation is passed. In the second place, all psychological investigation shows that the process of mental conception lies beyond the scrutiny of exact observation. Hence judges have generally united in holding that while there must be some sort of *premeditation* (*i. e.* the blow must not be the incident of mania or a sudden paroxysm of passion, such as suspends the intellectual powers), a moment is as sufficient to complete the offence as a year.

"It is true," as was said by a wise judge, "the act says the killing must be wilful, deliberate, and premeditated. But every intentional act is, of course, a wilful one, and deliberation and premeditation simply mean that the act was done with reflection, and conceived beforehand. No specific length of time is required for such deliberation. It would be a most difficult task for human wit to furnish any safe standard in this particular. Every case must rest on its own circumstances. The law, rea-

ethics. Let it be supposed that a man without uttering a word should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence.' If there be a sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months. It is enough that an intention precedes, though the act follows instantly. The law has no favor to extend either to rapid or close execution of such a design. In the case before us, there was no provocation, no mutual combat, no heat of passion which the law can recognize — for out-

bursts of ungovernable passion do not excuse a man for any acts of atrocity he may commit under their influence; men are bound to control their passions, and if they suffer them to run away with their reason and senses, they ought to suffer for it." *State v. Spencer*, 1 Zab. 206. "We cannot discern a single circumstance which tends in any degree to soften one feature of the atrocity of the defendant's crime. Intending to take his victim's life, the defendant beat him upon the head with a deadly weapon, until his design was accomplished. This crime is, by our laws, murder; and we are well satisfied not only that this is the law, but that it could not be relaxed so as to exclude such cases as the present without substantially diminishing the security of human life." *Johnson, J., People v. Clark*, 3 Selden, 383.

son, and common sense unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of predetermination."<sup>1</sup>

<sup>1</sup> King, J., in *Com. v. Daley*, 4 Penn. L. J. 156. See *Dains v. State*, 2 Humph. 439. The inference of *premeditation* from the use of a fatal weapon was drawn forcibly by Chief Justice McKean, in the earliest reported Pennsylvania case. It appeared that a considerable number of negroes assembled; and about ten o'clock at night a quarrel arose between mulatto Bob, the prisoner at the bar, and negro David, the deceased. For a while, the parties fought with fists; and the prisoner was heard to exclaim "Enough!" The affray, however, became general, and continued so for some time. When it was over, the prisoner went to a neighboring pile of wood, and furnished himself with a club. He was advised not to use it, but he declared that he would, and entered the crowd with it in his hand. After remaining there about ten minutes, he left the crowd without his club; and, again repairing to the wood-pile, took up an axe. Being, likewise, dissuaded from returning to the crowd with the axe, he said, "he would do it;" and striking the instrument, with great passion, into the ground, swore that he would "split down any fellows that were saucy." Accordingly, he mixed once more among the people; a struggle was immediately heard about the axe; the prisoner then struck the deceased with it on the head; the deceased fell; and as he was attempting to rise, the prisoner gave him a second blow on the head with the sharp edge, which penetrated to the brain. After languishing three days, death was the consequence of this wound. "From these facts," said the chief justice, in sum-

ming up the evidence, "we are to inquire what crime the prisoner has committed? Murder, in the first degree, is the wilful, deliberate, and premeditated killing of another. There are various inferior kinds of homicide; but, on the present indictment, our attention is confined to a consideration of the highest and most aggravated description of crime. Then, let us ask, did the prisoner wilfully kill the deceased? It is not pretended that there was any accident in the case; and, therefore, the act must have been wilful. Was the killing deliberate and premeditated? or was it the effect of sudden passion, produced by a reasonable provocation? There had been a combat with fists; but this was over, when the prisoner, without any new provocation, first procured a club, and losing that weapon, afterwards armed himself with an axe. It cannot surely be thought that the original combat was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled by a battery more violent; but the life of a fellow-creature must not be taken, unless in self-defence. It has been objected, however, that the amendment of our penal code renders premeditation an indispensable ingredient, to constitute murder of the first degree. But still, it must be allowed, that the intention remains, as much as ever, the true criterion of crimes, in law, as well as in ethics; and the intention of the party can only be collected from his words and actions. In the present case, the prisoner declared, that he would 'split the skull of any fellows who should be saucy;'

The true view is that "intent" and "deliberation" are to be inferred from facts; that they are not to be negatived because there is no direct proof of their existence prior to the fatal blow; and that the character of the weapon used, if it is used coolly and intelligently, is sufficient to give inferences by which the nature of the intent can be determined.<sup>1</sup>

§ 181. *Facts from which premeditation may be inferred.*—

There are, however, certain facts which, when proved, justify instructions to the jury that from them a deliberate intent to take life may be inferred. Where a man deliberately makes use of a weapon likely to take life;<sup>2</sup> where he declares his intentions to be deadly; where he makes preparations for the concealing of the body; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it; where, in any way, evidence arises which shows a harbored design against the life of another; such evidence, when standing by itself, entitles us to hold as a presumption of fact, that the intention to take life was deliberate. Thus, where the defendant struck the deceased violently on the head with a sharp and heavy axe, it was held murder in the first degree, deliberation being shown; and it was said by McKean, C. J.: "Let it be supposed that a

and he actually killed the deceased in the way which he had menaced. *But let it be supposed that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence.* The construction which is now given to the act of assembly, on this point, must decide whether the law shall have a beneficial or a pernicious operation. Before the act was passed, the prisoner's offence would clearly have amounted to murder,—all the circumstances implying that malice which is the gist of the definition of the crime at common law: and if he escapes with impunity under an interpretation of the act different from the one which we have delivered, a

case can hardly occur to warrant a conviction for murder in the first degree. Tenderness and mercy are amiable qualities of the mind; but if they are exercised and indulged beyond the control of reason and the limit of justice, for the sake of individuals, the peace, order, and happiness of society will inevitably be impaired and endangered. As far as respects the prisoner, I lament the tendency of these observations; but as far as respects the public, I have felt it a sacred duty to submit them to your consideration." The jury rendered a verdict of guilty of murder in the first degree. *R. v. Mulatto Bob*, 4 Dall. 145. See *supra*, § 31.

<sup>1</sup> See *supra*, § 31; *infra*, § 671 *et seq.*

<sup>2</sup> *Kilpatrick v. Com.* 7 Casey, 198.



man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge human actions, be deemed a premeditated violence."<sup>1</sup> The same view was taken where the defendant loaded a pistol, took aim at, and shot the deceased;<sup>2</sup> where he deliberately procured a butcher's knife and sharpened it for the avowed purpose of killing the deceased;<sup>3</sup> where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was;<sup>4</sup> where he thrust a handspike deeply into the forehead of the deceased.<sup>5</sup> But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death. Thus, where the weapon of death was a club not so thick as an axe-handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to take life,<sup>6</sup> though it was otherwise when the weapon was a crow-bar, suddenly caught up.<sup>7</sup> The same inference of premeditation is drawn with still greater strength from the declared purpose of the defendant,<sup>8</sup> as where the defendant said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;<sup>9</sup> where it was said: "I am determined to kill the man who injured me;"<sup>10</sup> where he declared, the day before the murder, that he certainly would shoot the deceased;<sup>11</sup> where, in another case, the language was: "I will split down any fellow that is saucy;"<sup>12</sup> and where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed.<sup>13</sup>

<sup>1</sup> *Resp. v. Mulatto Bob*, 4 Dallas, 145, just cited at large; *infra*, § 671.

<sup>2</sup> *Com. v. Smith*, 7 Smith's Laws, 696; *infra*, § 671.

<sup>3</sup> *Com. v. Burgess*, 2 Va. Cases, 484; *infra*, § 671 *et seq.*

<sup>4</sup> *Bennett's case*, 8 Leigh, 749.

<sup>5</sup> *Swan v. State*, 4 Humph. 189, and see generally *infra*, § 671 *et seq.*; *U. S. v. Cornell*, 2 Mason, 94; *Woodside v. State*, 2 Howard, 656; *State v. Tooby*, 2 Rice's Digest, 104; *Com. v. Whiteford*, 6 Randolph, 721.

<sup>6</sup> *Com. v. Murray*, 2 Ashmead, 57.

<sup>7</sup> *Kelly v. Com.* 1 Grant, 484.

<sup>8</sup> *Stewart v. Ohio*, 1 Ohio Sta e R. 66; *infra*, § 693.

<sup>9</sup> *Jim v. State*, 5 Humph. 145.

<sup>10</sup> *Com. v. Burgess*, 2 Va. Cases, 484; *infra*, § 693.

<sup>11</sup> *Com. v. Smith*, 7 Smith's Laws, 697.

<sup>12</sup> *Resp. v. Mulatto Bob*, 4 Dallas, 146.

<sup>13</sup> *Com. v. Zephon*, MS., Phil. 1844.

On a trial before Judge King, in Philadelphia, in 1826, it appeared that the defendant was a drummer in

§ 182. *Where A., with intent to kill C., maliciously shoots at C. and kills B., without particular intent to kill B., offence is murder*

the marine corps, and attached to the navy yard in the district of Southwark, and that on the 19th of October, 1825, he had been out of the yard, but returned between the hours of two and four o'clock, and went to room No. 8. Soon after his return a noise was made by some one in the room, and the deceased (who was drill sergeant of the station) was at the time engaged in drilling some recruits in front of the room. The deceased ordered silence, and went into the room, where words were heard between the defendant and Clunet, the deceased. The order was not obeyed, and the noise continued. In a few minutes Clunet called upon Evan W. Gamester, who was sergeant of the guard, to arrest Green, the defendant. He went to the room where Green was, and ordered him to come with him immediately to the guard-house. He said he would go for Gamester, but not for Clunet. In a few minutes he called Clunet "a damned son of a bitch," or words to that effect. Clunet, who had left him and gone back to the troops, stepped into the room and said, "If you repeat them words again, you damned scoundrel, I'll knock you down with the musket." Clunet then held his musket at an advance, and came towards Green, and raised his musket with the butt towards Green, as if he meant to give him a shove back. Green then threatened that if he struck him with the musket, he would strike him back, or knock him down if he could. Gamester then caught Green by the left arm, and pulled him towards the door, to take him to the guard-house. Green then made use of some aggravating expressions. Clunet came at him again with the musket: as he

came within reach, Green jumped from Gamester and made some attempts to strike him. He caught Green and held him, and told him he should go to the guard-room. Clunet then came up with his musket and struck him an overhand blow upon the head. Green said, "it was a rascally or cowardly blow." Green was then taken to the guard-house. After he got there he asked permission to go to the hospital to get his head, that was bleeding, dressed, which was given to him. He returned in about fifteen minutes with his head dressed. He was ordered up-stairs, where he went. Ten or fifteen minutes before parade, Green was in the guard-room sitting by the stove quiet, and showed no passion or temper. Afterwards Green said, that "*Clunet never should strike another man; that he would shoot him the first opportunity he could get;*" he further said, that "*if he could get a loaded musket, he would shoot him as he passed the guard-room to the canteen.*" He then walked across the room once or twice; when he got to the desk near the door, he made a jump to the door, and seized a musket leaning against the pillar of the arcade, and fired. Clunet reeled and fell. When he fired, he bit his lips with great anger, and said, "he was damned glad he did not shoot Sergeant Duffy." The ball entered the back between the tenth and eleventh rib, about three inches to the right of the spine, passed through the diaphragm, penetrated the upper circumference of the liver, and came out of the front of the body on the right side, between the seventh and eighth rib. Immediately after discharging the musket, he brought it down to a charge, and let it drop and rushed into the guard-room, muttering

*in the first degree.* — The offence in such case is undoubtedly murder at common law.<sup>1</sup> Is it murder in the first degree under our

something not understood. He was followed up into the second story of the guard-room, where he was commanded to surrender. He submitted, and was secured in irons, during which time he was asked how he came to commit the offence. Green said, "*I am not sorry for it; any man would have done the same, and I demand that you deliver me over to the civil authority.*" He was then placed in a solitary cell, where he was visited frequently during the night. He several times asked if Sergeant Clunet was dead, and said: "O God, I must submit to my fate, and if he dies, I must be hung." On the second or third day, as the officer on guard opened the cell door, he heard Green exclaim: "I am damned glad I shot him. I hope I hit him in the right place, and I am not sorry for it." He told him he ought to take better care of what he said, and to think of something else; on which he observed, "O, Mr. Barton, I did not know you were here, and I did not know what I was saying." The day Sergeant Clunet died, which was the eighth day after receiving the wound, Green, who was informed of the fact, exclaimed: "O, my God, I am a murderer, and must be hung." It further appeared from the evidence produced, that the afternoon Clunet was shot, Green had been drinking, but was not intoxicated. In charging the jury, Judge King said, after directing attention to the question, first, whether there was deliberation, and secondly, whether there was a specific intention to take life, and assuming, from the evidence, that both were shown to exist: "Here I conceive a state of things arises

which as imperatively calls upon the court to pronounce their opinion upon what they believe to be the law of the case, as it is incumbent on the jury to pronounce their opinion on the law and evidence. We will neither shrink from nor temporize with our duty in this respect, but by an unequivocal expression of our judgment, take that portion of the solemn responsibility of this cause which is attached to us, as the organs through which the justice of the commonwealth is to be vindicated. Upon the supposition assumed, we are of opinion that the prisoner at the bar is guilty of wilful, deliberate, and premeditated murder; of murder in the first degree, as it is understood by our act of assembly." *Com. v. Green*, 1 Ashmead, 289.

The deceased, in a case occurring shortly afterwards, on the evening of the 9th of June, between eight and ten o'clock, while standing near the door of his dwelling with his brother and sister, received a stab in his belly by the hand of one who had approached and saluted him in a friendly manner; and it appeared that this man was recognized by both as the prisoner; and that the deceased himself, "a short time before he breathed his last, declared that black Williams stabbed him." Besides which it also appeared in evidence, that the night previous to the murder, the prisoner and one York, who had been tried with Williams and acquitted, had been knocked down, without provocation, by some persons who fled into a house close by, and escaped through a back passage, and that the prisoner swore he would have satisfaction for it. It was also proved that, on the day of

<sup>1</sup> See *supra*, § 42; and see also § 19-26.

statutes? Supposing the case to be one in which we can legitimately infer deliberation and intent, the answer, at the first view,

the murder the prisoner, with several blacks, had called at three different times at the house, inquiring in angry tones for the deceased; that after the murder the prisoner was found concealed, with great care, under the stairway in a cellar, in the vicinity of the murder, and that when arrested and while being conveyed to the prison, in reply to a remark made to him, had said, "Yes, but it is done, and I can't help it." The jury, having convicted him of murder in the first degree, the court refused to disturb the verdict. *Com. v. Williams* 2 Ashmead, 69. The opinion of the learned judge who presided relates chiefly to the bearing of dying declarations and of new trials, though one passage in reference to the former subject is worthy of notice in this connection; "Tribunals," he said, "whose function it is to decide disputed facts, either in criminal or civil investigations, are perpetually called on to infer the existence of one fact, not positively shown, from others, either admitted or proved, and with which the fact inferred has a necessary connection. In trials for murder in Pennsylvania, for instance, the jury, before they can convict of murder in the first degree, must be satisfied, not only that the criminal has committed the felonious homicide of which he is charged, but that in its perpetration he intended to take away the life of his victim. It is rare, indeed, that this last feature of this high crime can be shown by positive proof. Almost universally the jury are left to infer the existence of such a deadly intent, from the manner and circumstance of the homicide established. Felonious intention, guilty knowledge, malice, and other vital elements of crime, are

only ascertainable in the same way. If these are the ordinary functions of the jury, in what respect is it more difficult for a judge to decide from all the circumstances of a given case, as to the existence of a consciousness of impending dissolution in a declarant whose alleged death-bed declarations are offered in evidence? It is admitted that the judge should see his way clear, in coming to such a conclusion; but there is nothing incongruous with local analogies in his exercising such a function. The cases of this kind are numerous, in which a well regulated mind could act without hesitation. Suppose a victim of secret malice is found pierced through some vital part, with enough life left to tell by whom and how he has been so maltreated. Is it a natural, nay, an irresistible inference, that such a sufferer is impressed with the conviction of impending dissolution, although he does not employ any of the brief moments left him between time and eternity in saying so?" *Com. v. Williams*, 2 Ashmead, 74.

In 1846, Chief Justice Hornblower, in a charge in a capital case, after quoting the New Jersey act, which, as has been observed, is the same as that of Pennsylvania, said: "This statute, in my opinion, does not alter *the law of murder* in the least respect. What was murder before its passage is murder now: what is murder now, was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases; or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and that in *all other kinds of murder* the convict shall be punished by imprisonment. But the law of murder

would be in the affirmative. It is objected, however, that in such case there is no intent to take the life actually taken. But is this essential to murder in the first degree? If it be necessary to a conviction of murder in the first degree that such an intent should be exactly proved, could there be ever such a conviction? A., for instance, thinks that he is injured by B., and A. therefore shoots B. under the impression that he shoots one by whom he has been injured. But is this impression ever coincident with the truth? Can we recall any case of malice in which the defendant's passions did not, more or less, create an ideal object of enmity? Would it be any defence to the shooting of B. that A. supposed B. to be a different character from what he really was, and that therefore his shooting B. was a mistake? If we negative these questions, we can only do so by assuming the position that the grade of a malicious homicide is not reduced by the fact that the defendant acted under a mistake as to the person whom he killed. And there are several collateral reasons why we should not limit this principle by excluding from it cases

is the same. See *Commonwealth v. Dougherty*, in 1 Brown Append. page 18. It becomes then the duty of the court, in the first place, to define and declare what constitutes, and what will amount to the crime of murder at the common law; and if the jury believe that the defendant has been guilty of murder, it will be the duty and the province of the jury to say whether the prisoner is guilty of the murder in the *first* or in the *second degree*. 'Murder is defined to be the killing of a person under the peace of the state, with malice aforethought, either express or implied in law.' 1 Russ. on Cr. 421. Independent, however, of the common law presumption of malice, all will agree that killing by poison, by lying in wait, or by wilful and deliberate and premeditated design, is proof of express malice, and so killing by the use of a deadly weapon shows a clear intent to take life. Again, if a man in the act of perpetrating, or attempting to perpetrate

arson, rape, sodomy, robbery, or burglary kill another, this is evidence of express malice; because such conduct evinces a depraved mind, and shows malice against all mankind. In all these cases, therefore, the killing is murder in the first degree. Again, the premeditation or intent to kill need not be for a day, or an hour, nor even for a minute. For if the jury believe there was a design and determination to kill, distinctly formed in the mind at any moment before, or at the time the pistol was fired, or the blow was struck, it was a wilful, deliberate, and premeditated killing, and therefore murder in the first degree. Murder in the second degree, under our statute, includes those cases of constructive murder which are not accompanied with an intent to take life, but are committed by gross carelessness, or in the commission or attempt to commit some less crime than those which I have above enumerated." *State v. Spencer*, 1 Zab. 196.

where A. kills C. by mistaking C. for B. *First*, in such a killing, we have the constituents necessary to the guilt of murder in the first degree,—deliberation, intent, malice, and killing. *Secondly*, the policy of society eminently requires that life should be protected by the application of this principle; for while I may elude the attack of one with whom I know myself to be at enmity, no prudence on my part can ward off from me an attack which mistakes me for another, and to prevent such attack I must rely exclusively on the protection of the law. *Thirdly*, the question of particular intent is one as to which it is difficult to apply an exact gauge; and if it is necessary to prove in each case an exact intent to kill the particular person, just prosecutions must often fail, because in most cases, from the inherent imperfection of evidence, no such proof can be supplied.<sup>1</sup>

<sup>1</sup> See § 42; Callahan v. State, 21 Ohio St. 306.

In *Com. v. Dougherty*, 7 Smith's Laws, 698, the evidence was that the prisoner was addicted to drink, and when drunk was quarrelsome. It also appeared that his wife occasionally drank too much, and on the day of the fatal occurrence they had fallen into a drunken squabble. During the quarrel the wife threw several stones at him, one of which struck him on the arm. A few moments after they were seen struggling together, but soon after the wife was discovered fleeing with her infant in her arms, the prisoner pursuing her with an axe in his hand. When he came within reach of her he aimed a blow at her which fell on the head of the child as it lay upon the wife's shoulder, and caused a mortal wound of which the child died. The prisoner soon recovered himself and showed many signs of repentance, and manifested much distress at the manner of the child's death. Rush, P. J., a respectable though severe judge, who tried the case, in the course of his charge to the jury, said: "We now come to this point: what was the intention of the prisoner in the bar,

when he killed Daniel Dougherty, his child? for if his intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree; as much as if he had prepared a cup of poison for his wife and his child had drunk it. You, however, are in this case to judge of the law and facts. If you are of the opinion the injury the prisoner received from his wife throwing stones at him, and hitting him, kept his passion boiling until he gave the fatal blow, we think it your duty to find him guilty of manslaughter. But if you are of the opinion his passion had time to cool, or in fact had cooled, after the assault on him by his wife, it is your duty to convict him of murder in the first degree." The verdict was manslaughter. In this case, as will be observed, the verdict having been manslaughter, and no opportunity having existed of revising the charge, the authority of the case is limited by the fact of its having been made in the hurry of *nisi prius*, and by a single judge. Such also is the case with a subsequent charge in the same court, where the same point was announced

§ 183. *Where A. maliciously shoots at a body of men, intending to kill any one of them, and kills B., the offence is murder in*

by Judge Parsons of Philadelphia. *Com. v. Flavel*, MS. 1846.

A contrary opinion was subsequently asserted by the supreme court of Tennessee. In this case, the defendant, when aiming at the prosecutor, shot the prosecutor's wife, and McKinney, J., in delivering the opinion of the court, after recapitulating the facts, said: "The third section enacts that 'all murder that shall be perpetrated by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary, or larceny shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.' In this general definition, and enumeration of specific instances constituting murder in the first degree, there is a classification of various kinds of homicide, which it may be of some importance to notice, with a view to the question under consideration. In cases of murder by means of poison, or lying in wait, the most atrocious and detestable of all kinds of homicide, and the least to be guarded against, either by resistance or forethought, the crime is made to depend exclusively upon the 'means' causing death. So, likewise, in respect to cases of murder committed in perpetration of, or attempt to perpetrate arson, rape, robbery, burglary, or larceny, — a class of felonies most dangerous in their consequences to public safety and happiness, which may be most frequently and easily committed, and to which there is the strongest temptations. In all these cases, the mode or 'means' of de-

stroying life supplies a conclusive legal presumption of malice and guilty intention; the crime, as well as the guilt of the agent, is made to depend alone upon the fact of taking life in either of the specified modes. In such cases the question of malice or intention, as a matter of fact, is wholly irrelevant; it need not be proved, and cannot be controverted by the accused. But the remaining species of murder defined in the statute, namely, murder 'by any other kind of wilful, deliberate, malicious, and premeditated killing,' falls within the operation of a directly contrary principle. Here the character of the crime and guilt of the agent are made to depend exclusively upon the mental status at the time of the act, and with reference to the act which produces death. This accumulated definition of murder in the first degree takes in all the ingredients of crime descriptive of the utmost malignity and wickedness of heart, as well as of the highest and most aggravated species of homicide. If the universal principle of construction is to be regarded, that every word in a statute is to have meaning and effect given to it, if practicable, it results of necessity, by force of the terms employed in the definition of the crime, that, to constitute murder in the first degree, it must be established that there existed in the mind of the agent, at the time of the act, a specified intention to take the life of the particular person slain. The characteristic quality of this crime, and that which distinguishes it from murder in the second degree, is the existence of a settled purpose and fixed design on the part of the assailant, that the act of assault should result in the death of the party assailed, — that death being

*the first degree ; if he intends only to hurt seriously, it is murder in the second degree.* — The first of these propositions is set-

the end aimed at, the subject sought for and wished. 4 Humph. 136, 139. The 'killing' must be wilful, that is, of purpose, with the intent that the act by which the life of a party is taken should have that effect. Yerg. 551. 'Proof must be adduced to satisfy the mind, that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought.' 1 Leigh's Rep. 611. If, then, by misadventure or other cause, a blow, directed at a particular person and designed to take his life, take effect upon and cause the death of a third person, against whom no injury was meditated, can it be said, that the will concurred with the act which resulted in the accidental death of such third person, or that there existed a specific intention to take his life? A grosser absurdity cannot be conceived. The hypothesis that the killing was undesigned concedes that the will did not concur with the act; that in point of fact no such specific intention existed, no such result was either contemplated or designed. And upon what principle is it that this would be murder at common law? 'Simply upon the principle of implied or imputed malice and intention. In such case, all the essential elements of murder at common law occur. A homicide has been committed with deadly weapon, in the attempt to perpetrate a felony, by taking the life of another person without legal justification as excuse, and in such case, from the circumstances and deadly weapon, the law conclusively presumes malice and intent to murder; and in like manner, the law conclusively presumes that the party contemplated the consequences of his own act.

There is another principle applicable in such cases, namely, the law by imputation, so to speak, refers the act of murder to the felonious intent existing in the mind of the agent toward the principal object of his revenge. 'Thus,' says Blackstone, 4 Bl. Com. 261, 'if one shoots at and misses A., but kills B., this is murder; because of the previous felonious intent, which the law transfers from the one to the other.' But we have seen that murder in the first degree, as constituted by our statute, depends upon the existence of a specific intention to take the life of a person slain, and that the existence of such an intention as a matter of fact, must be satisfactorily established. Hence it is clear to a demonstration, that all legal implication or imputation of such an intention is excluded in reference to this particular species of murder. It is equally clear that all cases of homicide, not falling within the principles here announced, properly belong to the comprehensive class, included in the statute, of 'all other kinds of murder,' which are declared to 'be deemed murder in the second degree.' To murder of this class, as well as to all inferior grades of homicide, the common law principle, asserted in the charge of the circuit judge, is clearly applicable. We are aware that in Pennsylvania, upon a statute almost identical in its terms with our own, a different construction has prevailed. In the case of the Commonwealth v. Dougherty, it appears from the note of the case, to which only we have had access, that the prisoner aimed a blow with an axe at his wife and it fell upon the head of a child which lay on her shoulder, and inflicted a mortal wound, of which it died. And it was held by the court,



tled by the reasoning of the last section. If A., intending maliciously to kill C., kills B. instead of C., is guilty of murder in the first degree, *a fortiori* is this the case where A., when killing B., kills one of a group of persons, one of whom he intended to kill.<sup>1</sup> On the other hand, if his intent was only to do serious bodily harm, his offence, though murder at common law, is only murder in the second degree under our statutes, it not containing the necessary constituent of an intent to kill.

§ 184. *Killing in perpetration, or attempted perpetration of arson, rape, robbery, burglary (or other offences specified in this connection in statute), not necessarily murder in the first degree.*

— It has sometimes been said that a homicide in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary is, under the Pennsylvania and cognate statutes, murder in the first degree. But it must be remembered that the statutes under criticism do not say that "*Homicide*," when so committed, shall be murder in the first degree, but that "*Murder*," when so committed, shall be murder in the first degree. Nothing, therefore, that is not murder at common law can be murder either in the first or second degree; and we have first to inquire, therefore, in de-

that if the person's intent was to kill his wife, and killing her would be murder in the first degree, killing his child will also be murder in the same degree. With deference to an authority so respectable, we think it very clear that no such conclusion can be legitimately deduced from the premises. We regret that we have not seen the opinion at length, in the case above mentioned. The brief extract before us merely asserts the proposition we have quoted; the process of reasoning by which the conclusion is supposed to be maintained is not given in the note. We confess ourselves at a loss to understand in what sense it can be predicated of the act of the prisoner in 'killing his child,' that it was wilful, deliberate, and premeditated, and more especially, how it can be made out that the will concurred with the act in such case. The contrary construction, we think, is alone

compatible with the plain terms of the statute, whether we regard their proper or popular acceptance: with the obvious spirit of the statute, which was to alleviate the punishment of murder, except in cases of the greatest enormity; with the benignant principle of interpretation, that, in favor of life a statute is to be construed most favorably in behalf of the accused, and most strictly against him; and finally with that intrinsic and fundamental distinction, in respect to the relative guilt of human actions, dependent upon the concurrence and non-concurrence of the will, which we trace back as far as the Jewish dispensation, under which cities of refuge were provided, to the end 'that every one that killeth any person unawares may flee thither, and be secure from the avenger of blood.'" *Bratton v. State*, 10 Humph. 103.

<sup>1</sup> See also *supra*, § 163.

termining the grade of any particular homicide under the statutes, whether it is murder at common law. We may take, for instance, a homicide committed in the perpetration of arson. Is such a homicide murder at common law? If it is, it is murder in the first degree, under the statutes before us. If it is only manslaughter at common law, then it is manslaughter under the statutes before us. Now, is such a homicide necessarily murder at common law? No doubt if a person sets fire to a dwelling-house under such circumstances that its inmates, as an ordinary sequence of the fire, are burned and die, then such malice is to be inferred as will make the case murder at common law. The defendant, we may be bound, as a presumption of fact, to infer, knew the house was a dwelling-house, and knew, supposing the fire to be communicated to it, that some one of its inmates would, in the ordinary course of events, be injured by the fire. The case would be that of a reckless and malicious firing into a crowd, which is murder at common law, if death ensue. But suppose that when perpetrating the arson the defendant, in accidentally discharging a gun, killed some one either in the house or in its neighborhood. Now, though we have several high authorities to the effect that this is murder at common law, the sounder view, as we have already seen,<sup>1</sup> is that in such case the defendant should be tried for arson in firing the building, and for manslaughter in the unlawful killing (without malice aforethought) of the deceased; since the malice aforethought necessary to constitute murder cannot be inferred, in face of the fact that the killing was in no way within the scope of the defendant's plan, from the mere fact of the arson. If this reasoning be correct, the defendant cannot, on the indictment for killing, be convicted of murder in the first degree, but must be convicted of manslaughter; and is liable to conviction on a separate indictment for arson.

§ 185. So also as to homicide committed in perpetration of a rape. If the offence would have been murder at common law, it is murder in the first degree under our statutes; and it is not necessary, to sustain in such case a verdict of the first degree, that a specific intent to take life should be proved, it being sufficient if there be shown an intent to do great bodily harm.<sup>2</sup> But

<sup>1</sup> See *supra*, § 56.

<sup>2</sup> *Com. v. Hanlon*, 3 Brewster, 461; *S. C. 8 Phil. R. 401.*

if the homicide is manslaughter at common law, then it is only manslaughter under our statutes. It is true that Daniel, J., in a case before the general court of Virginia,<sup>1</sup> has intimated that in the enumerated cases, the legislature has declared the law to be that the perpetrator shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result which the will, deliberation, and premeditation of the party accused sought. This, however, is rather an opinion thrown out in the course of argument than an express decision, for the question was not before the court; and it cannot therefore be treated as in positive conflict with the Connecticut and Pennsylvania authorities.

The same observation applies to a case in Virginia, where "wilful and excessive whipping," is among the enumerated instances, and where a verdict of murder in the first degree was sustained against a master for whipping a slave to death, though it was maintained that the intent was to do only bodily harm. It should be observed also, that in the Virginia act the term "other" is omitted before the phrase "*kind of wilful, &c., killing*," so that to some degree the bearing of the latter definition on the enumerated instances is weakened.<sup>2</sup> And it should be remembered that unlawful homicide by any cruel punishment is murder at common law.<sup>3</sup>

§ 186. *Homicide committed by means of poison or lying in wait, not necessarily murder in the first degree.* — The same observation applies to the agency of poison. A homicide by poison is not necessarily murder at common law.<sup>4</sup> If it is not, it is not murder in the first degree.<sup>5</sup> At the same time, where the evidence shows that the death was effected by intentional and malicious poisoning, it is the duty of the court to tell the jury that the offence is murder in the first degree. Thus in a case decided by the supreme court of Pennsylvania in 1872,<sup>6</sup> Agnew, J., giving

<sup>1</sup> Com. v. Jones, 1 Leigh, 610.

<sup>2</sup> Souther v. State, 7 Grat. 678.

<sup>3</sup> Supra, § 35; infra, § 676-680.

<sup>4</sup> See supra, § 92.

<sup>5</sup> State v. Dowd, 19 Conn. 388;

Chauncy, ex parte, 2 Ashmead, 227,

391. See Rhodes v. Com. 12 Wright,

396; Lane v. Com. 59 Penn. St. (9.

P. F. Smith) 371; Com. v. Jones, 1

Leigh, 610; Souther v. Com. 7 Grat.

678.

<sup>6</sup> Shaffner v. Com. 72 Penn. St.

(22 P. F. Smith) 60.

In State v. Dowd, cited in the last

note, the opinion, which was delivered

by Waite, J., is as follows: "The only

the opinion of the court, says: "The other errors assigned to the charge are not sustained. It is contended, and earnestly

question presented in this case is, whether it was competent for the jury, upon this indictment, to find the prisoners guilty of murder in the second degree, and for the court, upon such conviction, to impose the punishment prescribed by law for that offence. Formerly, in this state, a person convicted of the crime of murder, whatever might be the attending circumstances, was liable to the punishment of death. But in the year 1846 the legislature passed an act, in the preamble to which they say 'that several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of atrociousness, that it is unjust to involve them in the same punishment.' It is, therefore, enacted, 'that all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree.' The statute then provides, that a person convicted of the former offence shall suffer death; and of the latter, imprisonment for life. It is apparent, from this statute, that it was not the design of the legislature to create any new offence, or change the law applicable to murder, except so far as the punishment was concerned.

The crime still remains as it was at common law, and in the more aggravated cases, the person convicted is liable to the original punishment, while others, whose crimes are less aggravated, are punished with less severity. It is a general rule that in criminal cases it is not necessary to prove all the allegations contained in the indictment, but in general, it is sufficient to prove so much of them as will constitute a substantive crime, within the jurisdiction of the court before which the trial is had, and punishable by law. Thus, upon an indictment for murder, the jury may negative the averment that the act was done with malice aforethought, and convict of the crime of manslaughter. *State v. Nichols*, 8 Conn. R. 496; *King v. Hollingberry et al.* 4 B. C. C. 329; 10 E. C. L. 346; *Rex v. Hunt*, 2 Camp. 503; 2 Russ. on Crimes, 700. So if a person is charged with the commission of rape, he may be convicted of an assault with intent to ravish. *State v. Shepperd*. 7 Conn. R. 554; *Com. v. Cooper*, 15 Mass. Rep. 187. And if a person be indicted for an assault with intent to kill and murder, he may be convicted of an assault with intent to kill. *State v. Nichols*, 8 Conn. R. 496. In most cases mentioned in the statute, as constituting the crime of murder in the first degree, the lesser crime is manifestly included. Thus, if the charge were that the murder was committed by the accused while lying in wait, the jury might find that it was not so committed, and convict him only of the lesser offence. So if it were averred that the act was done by him while attempting to commit the crime of arson, or rape, the

pressed upon us, that the judge had no right to say to the jury that if the prisoner was guilty of murder, it was murder in the first degree, and it was their duty to say so regardless of consequences. The indictment charged a murder by poison, and such was the tendency of the evidence. It was not only the right but the duty of the judge to inform the jury of the degree which the law attaches to murder by poison, and to instruct them in their duty under the law. It is only when the charge becomes imperative, and takes from the jury the right of deciding and pronouncing the degree of the murder, that we have held it to be error. When left free, as in this case they were, to decide the degree for themselves, we have not held it to be error to impress upon their minds the legal inference from the facts, and their duty to

jury might find that part of the charge untrue, and still convict the person of murder in the second degree. Now, if the same rule applies to the case where the charge is for murder by poisoning, then the conviction, in this case, was legal. The language of the statute strongly favors such a construction. It provides that murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, shall be murder in the first degree; thereby implying, that in all cases the crime must be the result of a wilful, deliberate, and premeditated act. Hence, if any case can be supposed where murder may be committed by means of poison, and not be the result of such an act, then a conviction of murder in the second degree may be legal. And we do not feel ourselves authorized to say that the case under consideration might not have been one of that description, and consequently that the verdict is not right. Indeed, we are rather inclined to consider such the fair construction of the statute, especially as it is a highly penal one, and such a construction operates against the greater severity. But however this may be,

there is another provision in the statute more unequivocal. It says that the jury, if they find the accused guilty, shall ascertain in their verdict whether it be murder in the first or second degree. And if he be convicted by confession, the court shall determine the degree of crime, by examination of witnesses. This provision is positive, without any exception or qualification, and we do not feel authorized in the construction of a statute like this, involving the life or death of the person accused, to make an exception where the legislature have made none. We are rather inclined to think that in all cases the degree of criminality must be determined as a question of fact, and that a general conviction, upon any indictment, without such determination, would not authorize a court to impose the greater punishment. It was under such an impression that the court below, in submitting the case to the jury, informed them, that in case they should find the prisoners guilty of the offence charged against them, the statute made it their duty to determine the degree of their guilt. And the jury having so done, their verdict must stand."

obey the law. But when, as in *Rhodes v. Commonwealth*, 12 Wright, 396, and *Lane v. Commonwealth*, 9 P. F. Smith, 371, a court addresses a jury authoritatively, and requires of them a verdict of murder in the first degree, it is error. Jurors uninstructed in their rights in a capital case may feel themselves constrained by the peremptory direction of the judge. Both the cases referred to stood upon the same ground, and in both the error was the binding instruction of the court. The language in this case approaches closely the boundary line of peremptoriness, but we cannot say it overstepped it, in view of those parts of the charge which left them free to act for themselves. Jurors are so apt to lean away from a verdict of murder in the first degree, we must not scan too critically the language, if he has left them free to find the degree of the murder on the evidence."

§ 187. So also as to lying in wait. A man may lie in wait for another merely to commit a trespass; and if so, in case of an accidental killing, the offence, being only manslaughter at common law, is only manslaughter under our statutes. But if an intentional homicide by lying in wait be proved, then such homicide is ordinarily murder in the first degree.

§ 188. *Where A., intending to commit a felony the execution of which is not enumerated in the statutes as contributing to the definition of murder in the first degree, unintentionally kills B., the offence is manslaughter.* — A. shoots a tame fowl, and in so doing unintentionally and accidentally kills B. Is A. guilty in this of murder in the second degree under our statutes? No doubt we have several *obiter dicta* of our judges answering this question in the affirmative; though no case exists in which the point has been directly affirmed. But if we are to hold, as we may justly do, that such an offence is only manslaughter at common law, then it is only manslaughter under our statutes.<sup>1</sup>

§ 189. *When in "attempt" to commit one of the enumerated felonies, the attempt must consist of a substantive indictable offence.* — The word "attempt," as used in the statutes, must be construed strictly, as describing such an attempt as is indictable. Hence it is not sufficient, in order to bring the case under the statutes, that the homicide should have been committed while in preparing to commit the felony in question;<sup>2</sup> nor is it enough

<sup>1</sup> See this point examined, *supra*,      <sup>2</sup> Whart. C. L. 7th ed. § 2691.

that the offence consists in mere solicitation;<sup>1</sup> or in purpose without distinctive overt act.<sup>2</sup> "An attempt to commit a rape, in which killing occurs, is necessarily an overt act, indicating the intent and purpose of the assault, of which clear proof, sufficient to place the case beyond reasonable doubt, should be given. A mere intention to commit the offence is nothing, unless accompanied by acts directed towards its accomplishment. The killing, to constitute the crime of murder, without the specific intent to take life, must be already shown by the prosecution to have occurred in the performance of such acts as should establish the independent substantive crime."<sup>3</sup>

§ 190. *Murder in the second degree includes all common law murders in which the intention is not to take life, including cases in which the mind is in such a state as to be incapable of specific intent.* — Murder in the second degree includes all cases of common law murder where the intention was not to take life, of which murder, when the intent was only to do great bodily hurt, may be taken as a leading illustration.<sup>4</sup> There may, also, be cases where death ensues during a riotous affray, under circumstances which would constitute murder at common law, but which, in consequence of the want of a specific intent to take life being shown, amount but to murder in the second degree. Thus, where it appeared that the deceased, during the Kensington riots, was killed while a desultory fire was going on, the object of which was to prevent either of two contending parties from taking possession of a position which both of them were desirous of obtaining, it was said that a homicide, committed under such circumstances, though murder at common law, deliberation being shown, might not be murder in the first degree, and a verdict of murder in the second degree was consequently rendered. The learned judge who tried the case, however, charged the jury, "that if one or more of the parties so engaged in an unlawful combat deliberately fire at and kill an innocent third person taking no part in the conflict, having no just reason to regard him as one of the belligerents, such killing would be murder in the first degree. It

<sup>1</sup> Whart. C. L. 7th ed. § 2692.

<sup>2</sup> Ibid.

<sup>3</sup> Thompson, J., *Kelly v. Com.* 1 Grant, 486.

<sup>4</sup> *Whiteford v. Com.* 6 Randolph, 721; *State v. Decklotts*, 19 Iowa, 447; *Com. v. Dougherty*, 7 Smith's Laws, 696.

would present the case of a wilful, deliberate, and premeditated killing, perpetrated with an instrument likely to take life, rendering the actual perpetrators guilty of the highest grade of crime known to our criminal code. If the testimony in your judgment," he said, "brings clearly home to the defendant such a charge, he should be convicted. If, however, the commonwealth has not fully satisfied your minds in the affirmative of this position, or if the proofs adduced by the defendant have rebutted this allegation, or thrown a fair doubt upon its certainty, then you ought not and cannot justly convict him of that part of the charge involving capital punishment."<sup>1</sup>

To the same effect, Judge Rogers charged a jury in the same course of trials: "What, then, is the law in such a case? I say, unhesitatingly, the law is, that if, in such a conflict, death ensues, all parties are guilty of murder at common law. They are engaged in an unlawful design, which is the first ingredient of murder; and it is only necessary to consummate the offence, that death should be the consequence. It is not necessary, in order to charge a particular offender, that he should be proved to have fired the particular gun, or discharged the particular missile that caused the fatal wound. In the contemplation of the common law, where a mob of ten thousand is engaged in an unlawful design, and one of them, not out of special malice, but a general design to do harm, fires a gun, they are all to be considered as having pulled the trigger. But while such is the common law, the Pennsylvania act of 1794, by creating a distinction between murder with a specific intent to take life, and murder without such intent, has established a test, which it becomes your duty in the next place to consider. The reason of the establishment of the new grade, undoubtedly, was the inhumanity of attaching capital punishment to anything under an actual and specific intention to take life. Was there such an intent here? It is for you to say whether the parties who formed the mob, or either of them, were actuated by so incredibly malignant a temper. It will be well for you to consider, whether the object of such outbreak and of such intent, was not rather to humble than to slay an adversary; rather to chastise than to annihilate. But be this as it may, I charge you that no

<sup>1</sup> *Com. v. Hare*, 4 Penn. Law Jour. 401; and see *Com. v. Jones*, cited *infra*, § 584.



special malignity on the part of an individual or individuals, against a specific object, can affect his associates with the grade of the guilt incurred by himself. They are answerable for the common design of those with whom they associate; not for the private design of individuals. Should you find that the object of the conflicting parties in the riot in which the deceased found his death was merely to humble and repulse each other, — should you reject the theory that their object was death and annihilation, — then your finding will be for murder in the second degree.”<sup>1</sup>

§ 191. *Murder when premeditated in drunkenness is murder in the second degree.* — When the defendant is in such a state of drunkenness as to be incapable of forming a specific intent to take life, then the offence, if murder at common law, is murder in the second degree under the statutes.<sup>2</sup> “Implied malice is sufficient at common law to make the offence murder, and under our statute to make it murder in the second degree; but to constitute murder in the first degree, actual malice must be proved. Upon this question the state of the prisoner’s mind is material. In behalf of the defence, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, but as tending to show that the less and not the greater offence was in fact committed.”<sup>3</sup>

<sup>1</sup> Com. v. Sherry, Appendix MS.; S. P. Com. v. Neills, 2 Brewster, 553.

<sup>2</sup> Com. v. Haggarty, cited Lewis C. L. § 403; Kelly v. Com. 1 Grant, 484; Haile v. State, 11 Humph. 154; Pirtle v. State, 9 Humph. 66, 154; State v. Johnson, 40 Conn. 186; State v. Harlow, 21 Mo. 446; Boswell v. Com. 20 Grt. 860; Jones v. Com., and other cases cited *infra*, § 584.

<sup>3</sup> Carpenter, J., State v. Johnson, 40 Conn. 186; Com. v. Jones, 1 Leigh, 612; Com. v. Haggarty, Lewis C. L. 403; Pirtle v. State, 9 Humph. 664.

“Except in the case of murder, which happens in consequence of actual or attempted arson, rape, robbery, or burglary,” says Judge Lewis, of the

supreme court of Pennsylvania, “a deliberate intention to kill is the essential feature of murder in the first degree. When this ingredient is absent; where the mind, from intoxication or any other cause, is deprived of its power to form a design, with deliberation and premeditation, the offence is stripped of the malignant features required by the statute to place it on the list of capital crimes; and neither courts nor juries can lawfully dispense with what the act of assembly requires.” Lewis C. L. 405.

So in Haile v. State, 11 Humph. 154, Green, J., said: “Upon the trial, there was evidence that the prisoner was intoxicated at the time he com-

§ 192. *Killing a woman in an attempt to produce abortion, murder in the second degree.* — As has been already noticed, if a

mitted the homicide. Upon the subject of the defendant's intoxication the judge told the jury that 'voluntary intoxication is no excuse for the commission of crime; on the contrary, it is considered by our law as rather an aggravation; yet if the defendant was so deeply intoxicated by spirituous liquors at the time of the killing as to be incapable of forming in his mind a design deliberately and premeditatedly to do the act, the killing, under such a state of intoxication, would only be murder in the second degree.' It is insisted that his honor did not state the principle upon this subject, as it has been ruled by this court. In the case of *Swan v. The State*, 4 Humph. R. 136, Judge Reese, who delivered the opinion of the court, says: 'But although drunkenness in point of law constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made to depend by law upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental status? Is it one of self-possession, favorable to a fixed purpose, by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits? In such case it matters not that the provocation was inadequate, or the spirits voluntarily drank; the question is did the act proceed from sudden passion, or from deliberation and premeditation? What was the mental status at

the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has been in point of fact committed.' In these remarks the court intended to be understood as distinctly indicating, that a degree of drunkenness by which the party was greatly excited, and which produced a state of mind unfavorable to deliberation and premeditation, although not so excessive as to render the party absolutely incapable of forming a deliberate purpose, might be taken into consideration by a jury, in determining whether the killing was done with premeditation and deliberation. The whole subject was ably reviewed by Judge Turley, in the case of *Pirtle v. The State*, 9 Humph. Rep. 663. In delivering the opinion of the court, in that case, the judge says, at page 671: 'It will frequently happen necessarily, when the killing is of such a character as the common law designates as murder, and it has not been perpetrated by means of poison, or by lying in wait, that it will be a vexed question, whether the killing has been the result of sudden passion produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of premeditation and deliberation; and in all such cases whatever fact is able to cast light upon the mental status of the offender is legitimate proof; and among others, the fact that he was at the time drunk; not that this will excuse or mitigate the offence, if it were done wilfully, deliberately, mali-

pregnant woman be killed in an attempt to produce abortion in her, and it appears that the design of the operator was not to

ciously, and premeditatedly (which it might well be, though the perpetrator was drunk at the time), but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat, to the point of taking life, without premeditation and deliberation.' Here, the court explicitly lays down the rule to be, that in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation. And the degree of drunkenness which may then shed light upon the mental state of the offender is not alone that excessive state of intoxication which deprives a party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act; for the court says that in the state of drunkenness referred to, a party well may be guilty of killing wilfully, deliberately, maliciously, and premeditatedly; and if he so kill, he is guilty as though he were sober. The principle laid down by the court is, that when the question is, can drunkenness be taken into consideration, in determining whether the party be guilty of murder in the second degree, the answer must be, that it cannot; but when the question is, what was the actual mental state of the perpetrator at the time the act was done, — was it one of deliberation and premeditation, — then it is competent to show any degree of intoxication that

may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done. The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case it is murder, though the perpetrator were drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness be caused. The law in such cases does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which it is implied having been proved, the law presumes its existence, and proof in opposition to this presumption is irrelevant and inadmissible. Hence a party cannot show he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him. But when the question is, whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion to the actual state of mind with which this act was done. All murder in the first degree (except that committed by poison, and by lying in wait) must be perpetrated wilfully, deliberately, maliciously, and premeditatedly. The jury must ascertain, as a matter of fact, that the accused was in this state of mind when the act was done. Now, according to the cases of *Swan v. The State*, and *Pirtle v. The State*, any fact that will shed light upon this subject, may be looked to by them, and may constitute legitimate proof for their consideration. And among other facts, any state of drunkenness being proved, it is a legitimate subject of inquiry, as to what in-

take the life of the mother, the offence has been held murder in the second degree.<sup>1</sup> And on the principles already expressed, this may be defended in all cases where the intent was to do the mother serious bodily harm. Where there is no such intent, the proper course is to indict separately for the manslaughter of the mother, and for the perpetration of the abortion.

§ 193. *Murder in second degree a compromise courts are unwilling to disturb.*— The general result of the authorities is that wherever the deliberate intention is to take life, and death ensues, it is murder in the first degree; wherever it is to do serious bodily harm, and death ensues, it is murder in the second degree; while the common law definition of manslaughter remains unaltered. This distinction, however, it is difficult practically to preserve. In those jurisdictions where the juries are entitled to take control of the law, it of course gives way to other tests more agreeable to the prejudices of the particular case. And even where the court is at liberty to assume its proper province, and where it lays down the law with precision and fulness, a jury is very apt to seize upon murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect.<sup>2</sup>

§ 194. *Presumption when killing is shown to be malicious, and*

fluence such intoxication might have had upon the mind of the offender, in the perpetration of the deed. We know that an intoxicated man will often, upon a slight provocation, have his passions excited, and rashly perpetrate a criminal act. Now, it is unphilosophical for us to assume, that such a man would in the given case be chargeable with the same degree of premeditation and deliberation that we would ascribe to a sober man, perpetrating the same act upon a like provocation. It is in this view of the question that this court held in Swan's case, and in Pirtle's case, that the drunkenness of a party might be looked to by the jury, with the other facts in the case,

to enable them to decide whether the killing were done deliberately and premeditatedly. But his honor, the circuit judge, told the jury that drunkenness was an aggravation of the offence, unless the defendant was so deeply intoxicated, as to be incapable of forming in his mind a design deliberately and premeditatedly to do the act. In this charge there is error, for which the judgment must be reversed."

<sup>1</sup> Supra, § 41, 66; Chauncy, ex parte, 2 Ashm. 227; State v. Moore, 25 Iowa, 128; Com. v. Jackson, 15 Gray, 187.

<sup>2</sup> Slaughter v. Com. 11 Leigh, 682. See State v. Ostrander, 30 Mo. 18. See, however, Clem v. State, 42 Ind. 420.

*nothing more, to be murder in the second degree.* — The character of the presumption to be drawn in cases of malicious killing is elsewhere independently discussed.<sup>1</sup> It is scarcely necessary here to repeat that such a presumption is an inference of fact to be drawn from all the circumstances of the particular case. If a killing be shown with a deadly weapon, intentionally, deliberately, and unjustifiably used, then the inference, as we have just seen, is that of an intent to take life, and the case is murder in the first degree. Stripping the case of these incidents, however, and supposing that simply a malicious killing be proved, then the presumption is of murder in the second degree.<sup>2</sup>

<sup>1</sup> See *supra*, § 39; *infra*, § 660.

<sup>2</sup> See *infra*, § 660; Hill's case, 2 Grat. 594; *State v. Holmes*, 54 Mo. 158; *State v. Turner*, Wright, 20. In *O'Mara v. Com. Sup. Ct. Penn.* May, 1874, reported in *Legal Int.* for Oct. 16, 1874, Agnew, C. J., said: —

"The tenth, eleventh, and twelfth errors were not properly assigned, but *in favorem vite* we have permitted amendment. The tenth and eleventh raise the question, whether a presumption in law of murder arises from an unlawful homicide, or whether it is one solely of fact to be determined by a jury. The answer of the court to the first point was, that if the jury found an unlawful killing it is presumed to be murder of some degree, unless the contrary appears in the evidence; though this presumption rises no higher than of murder in the second degree, until it is shown by the commonwealth to be murder in the first degree. The second point called upon the court expressly to charge that the presumption was one of fact only. This the court declined. In these rulings the court followed *Dunn v. Commonwealth*, 8 P. F. Smith, 18, stating the common law of the crime of murder.

"The crime of murder was not altered by the Act of 22d April, 1794, since incorporated into the amended

Criminal Code. In *White v. The Commonwealth*, 6 Binney, 152-3, C. J. Tilghman said: 'Now this act does not define the crime of murder, but refers to it as a known offence; nor, so far as concerns murder in the first degree, does it alter the punishment, which always was death. All that it does is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments.' Justice Blackstone, in his *Commentaries*, vol. 4, p. 201, says, we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless when justified, excused, or alleviated. All these circumstances of justification, excuse, or alleviation, he continues, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt. For all homicide, he says, citing *Foster*, 255, is presumed to be malicious, until the contrary appeareth upon evidence. The same rule is stated by Judge Addison in three cases: *Honeyman's*, *McNall's*, and *Lewis's*. *Add. Rep.* 145, 257, 282. *Prima facie*, he says, every killing is

§ 195. *Under the statutes, common law indictment for murder sufficient to sustain a verdict of guilty of murder either in the first or the second degree.*— It being held, as has already been seen fully, that the line separating murder from manslaughter is in no way changed by our statutes; and it being further seen that murder in the second degree is simply murder at common law with certain aggravating features discharged, it follows that on a common law indictment for murder a verdict of murder either in the first or in the second degree can be sustained. So, indeed, have our courts, in many instances, ruled.<sup>1</sup> The same

murder, for malice is presumed, unless the prisoner show extenuating circumstances which take away the presumption of malice. This then is a common law presumption, but when the legislature classified murders, arranging them in two degrees, the burden fell upon the commonwealth to show that the homicide is murder in the first degree; the common law presumption rising no higher than the second degree."

In a Texas case it is said: "When a homicide has been proven, that fact alone authorizes the presumption of malice, and unexplained would warrant a verdict for murder in the second degree. But express and premeditated malice can never be presumed; it is evidenced by former grudges, previous threats, lying in wait, or some concerted scheme to kill, or do some bodily harm, as poisoning, starving, torturing, or the attempted perpetration of rape, robbery, or burglary, and these evidences of express malice, or some one of them, must be proven as directly as the homicide, before the jury are authorized in finding a verdict for murder in the first degree.

"The distinction between murder in the first and second degrees has been so often discussed by this court, that we deem it necessary here only to refer to a few cases deciding this question:

McCay v. The State, 25 Texas, 33; Maria v. The State, 28 Texas, 698; Ake v. The State, 30 Texas, 473; Lindsay v. The State, and Williams v. The State, decided at this term." Ogden, J., Hamby v. State, 36 Texas, 523.

<sup>1</sup> Com. v. Wicks, 2 Va. Cases, 387; Mitchell v. State, 5 Yerger, 340; Com. v. Flannagan, 7 Watts & Serg. 415; Com. v. White, 6 Binney, 183; Com. v. Miller, 1 Va. Cases, 310; Com. v. Gibson, 2 Va. Cases, 70; Hines v. State, 8 Humph. 597; Livingston's case, 14 Grattan, 592; Gehrke v. State, 18 Texas, 568; White v. State, 16 Texas, 206; Wall v. State, 18 Texas, 682; People v. Lloyd, 9 Cal. 54; McAdams v. State, 25 Ark. 405; Leschi v. Territory, 1 Wash. Ter. 23; Green v. Com. 12 Allen, 155; Fahnestock v. State, 23 Ind. 281; Fitzgerald v. People, 37 N. Y. 413; Kennedy v. People, 39 N. Y. 245; Pike v. State, 49 N. H. 399; State v. Lessing, 16 Minn. 75; State v. Millain, 3 Nev. 409; People v. Bonilla, 38 Cal. 699; State v. Verrill, 54 Me. 408. See State v. Cleveland, 58 Me. 564; Hogan v. State, 30 Wisc. 437; Davis v. State, 39 Md. 355. In Missouri, however, it is held necessary to specify the murder to have been wilful and deliberate, and to state the circumstances making it such. Bower v. State, 5 Mo. 364; State v. Jones, 20 Mo. 58. As to California, see People v. Wal-

principle has been recognized in cases where murder is committed in the attempt to commit arson, rape, robbery, &c., in which cases the specific intent need not be alleged.<sup>1</sup> These rulings were first made in Pennsylvania, a state which was the earliest to legislate on this subject; and it needs but a glance at the statutes and their history to see that the interpretation then given to them by the courts is correct. The object of the statutes in Pennsylvania, and in the states that adopted the same legislation, was to provide that when a defendant's mind is not capable of a specific design to take life, then he is not to be capitally punished.<sup>2</sup> In subsequent Pennsylvania statutes, it was provided that when the defendant's mind is disturbed to the further extent of being actually insane, then the jury is to acquit of the felony, but find the insanity, upon which the defendant is to be imprisoned as a dangerous lunatic. Analogous statutes have been adopted throughout the United States. Now it is no more reasonable to require a "specific intention to take life" to be specially averred to meet the first class of statutes, than it is to require "sanity" to be specially averred to meet the second class of statutes.<sup>3</sup> The legal scope of murder, as a generic term, is unchanged by either of the statutes. All that the statutes say is that when the jury find that the murder was committed in certain conditions of mind, then the punishment shall not be death, but imprisonment. We cannot reject this reasoning, without holding that in all cases where a jury are, by statute or otherwise, authorized to find a diminished responsibility, the indictment must specially negative the facts implying such diminished responsibility. But this is absurd; and we must therefore fall back on the position established above, that an indictment for murder at common law is sufficient in case of murder in the first degree.

By the same reasoning, it has been held in Pennsylvania not

lace, 9 Cal. 30; *People v. Lloyd*, *Ibid.* 54; *People v. Steventon*, *Ibid.* 273; *People v. Dolan*, *Ibid.* 576; *People v. Murray*, 10 Cal. 309; *People v. Choisier*, *Ibid.* 310; *People v. Urias*, 12 Cal. 325. As to Iowa, rejecting the views of the text, see *State v. McCormick*, 27 Iowa R. 402; *State v. Watkins*, *Ibid.* 415.

<sup>1</sup> *Com. v. Flannagan*, 7 Watts & Serg. 415.

<sup>2</sup> See *supra*, § 171; and particularly 1 Whart. & St. Med. J. § 181, 214, 227.

<sup>3</sup> This has been even held when the statute makes a "sound mind" a constituent of murder. *Fahnestock v. State*, 23 Ind. 231.

necessary to aver "against the statute," in the conclusion, the *offence* being at common law, and only the punishment statutory.<sup>1</sup>

In Maine, under a similar statute, on an indictment for murder at common law, Shepley, J., in 1845, charged the jury that they could find one of four verdicts; not guilty, guilty of manslaughter, guilty of murder in the second degree, or murder in the first degree. "If it was proved that the prisoner killed Otis, the burden was upon him to reduce the offence from murder. The distinction between murder in the first and second degrees was, that it must be proved that the deed was done with express malice, and with an intent to take life. Murder in the second degree might be found where there was no intention to take life, but it was taken, not upon a mutual combat or sudden provocation, but in an assault made in consequence of pre-conceived anger or resentment, although not amounting to an intention to kill. That, in this case, to reduce the offence to manslaughter, the jury must be satisfied, from the facts proved by the government, that the assault was not the result of pre-conceived anger, but upon some new and sudden provocation given at the time or in the mutual combat. If the prisoner went there for the purpose of flogging the deceased, and did make the assault accordingly, and there was no sufficient provocation to excite him anew, and no mutual combat, then, although he did not intend to kill, he would be guilty of murder in the second degree."<sup>2</sup>

In New Hampshire, murder committed in perpetrating a robbery is murder of the first degree, although not committed with a deliberate and premeditated design to kill. Under an indictment, alleging that the accused "feloniously, wilfully, and of his malice aforethought did kill and murder," the jury may return a verdict of "guilty of murder in the first degree," upon proof of murder by deliberate and premeditated killing. Under such an indictment the jury may return a verdict of "guilty of murder in the first degree," upon proof of murder committed in perpetrating robbery.<sup>3</sup>

<sup>1</sup> Com. v. White, 6 Bin. 183.

<sup>2</sup> State v. Varney, 8 Boston Law R. 542. Under the act of 1865, c. 329, it is necessary only to charge that the defendant "feloniously, wilfully, and

of his malice aforethought," did kill the deceased. State v. Verrill, 54 Me. 408.

<sup>3</sup> State v. Pike, 49 N. H. 399 (Smith, J. 1869).



In summing up the adjudications on this point we may say that in Massachusetts, New York, Virginia, Indiana, Wisconsin, Arkansas, Texas, Nevada, Minnesota, California, and Washington Territory, as well as in Pennsylvania, Maine, and New Hampshire, which have been specially cited above, an indictment for murder at common law will sustain a verdict of murder in the first degree.

In Iowa, it has been held by the supreme court error to put the defendant on trial for murder in the first degree, on an indictment charging murder in the second degree, though the conviction was only for murder in the second degree.<sup>1</sup>

In Connecticut, a statute was passed in 1870 declaring that in all indictments of murder the degree shall be charged. This, however, does not touch indictments found prior to its passage, in which it is not necessary to allege the degree.<sup>2</sup>

§ 196. *Verdict on a common law indictment for murder may be for either degree.* — Under an indictment for murder at common law, there may be, as has just been incidentally noticed, a conviction of either murder in the first or of murder in the second degree, as well as a conviction of manslaughter.<sup>3</sup> Hence, under such an indictment, if there be a conviction for manslaughter, or of murder in the second degree, the more correct course is to find "not guilty of murder, but guilty of manslaughter," or "of murder in the second degree."<sup>4</sup> In Maryland this has been held essential.<sup>5</sup> But such a degree of particularity is inconsistent with the practice which has been generally sustained.<sup>6</sup> And in any view, an acquittal or conviction of the minor degree on an indictment good for the major, is an acquittal on the major.<sup>7</sup>

<sup>1</sup> See *State v. McNally*, 32 Iowa, 581; *State v. McCormick*, 27 Iowa, 482. As to Missouri, see *State v. Phillips*, 3 Jones, 475.

<sup>2</sup> *State v. Smith*, 38 Conn. 397.

<sup>3</sup> See *Keefe v. People*, 40 N. Y. 348; *Com. v. Herty*, 109 Mass. 348; *Davis v. State*, 89 Md. 355.

<sup>4</sup> See *infra*, § 898.

<sup>5</sup> *State v. Flannigan*, 6 Md. 166. See *infra*, § 898; *Weighurst v. State*, 7 Md. 445.

<sup>6</sup> See authorities cited *Whart. C.*

L. 7th ed. § 561, 562, 563, 3183, 3196, and *infra*, § 898.

<sup>7</sup> See authorities given more fully *infra*, § 861. A verdict of guilty of murder in the second degree "is equivalent to an express acquittal of the defendant for murder in the first degree, and the defendant could successfully plead the proceedings in this case in bar of any subsequent prosecution against him for the same offence." *McMillan, C. J., State v. Lessing*, 16 Minn. 80, 187. So also

§ 197. *Verdict must designate the degree.* — This is now required in almost every jurisdiction by statute if not by common law.<sup>1</sup>

Under an indictment for murder at common law, it was once ruled in Pennsylvania that a general verdict of guilty will be sustained as a verdict for the higher grade, and the defendant sentenced on such verdict for murder in the first degree.<sup>2</sup> In a later case, however, when an indictment alleging that the defendant feloniously, wilfully, and of malice aforethought cast a certain person into a dam, &c., and held her in and under the water, whereby she was drowned, a verdict of "guilty, in manner and form as indicted," was held not to sustain a sentence of murder in the first degree, and the supreme court reversed the sentence, and imposed a sentence for murder in the second degree.<sup>3</sup> And now, under the crimes act, the verdict must specify the degree.

In Massachusetts, in a celebrated case, which underwent much discussion in 1865-6, it was held that a plea of "guilty of murder in the first degree," to the ordinary indictment for murder, was a plea of guilty of murder in the first degree, and that on this a capital sentence could be imposed.<sup>4</sup>

In New York the same rule obtains on a general verdict of guilty.<sup>5</sup> The practice elsewhere, however, is, to require the designation of the degree.<sup>6</sup>

§ 198. *Right of judge to direct verdict.* — The general duties

Com. v. Herty, 109 Mass. 348; People v. Knapp, 26 Mich. 112; State v. Smith, 53 Mo. 139; Clem v. State, 42 Ind. 420; *contra*, State v. McCord, 8 Kans. 231.

<sup>1</sup> See *infra*, § 900; Kennedy v. State, 6 Indiana, 485; State v. Town, Wright, 75; Thompson v. State, 26 Ark. 323; Parks v. State, *Ibid.* 101; McGee v. State, 8 Mo. 495; State v. Upton, 20 Mo. 397; Ford v. State, 12 Md. 514; State v. Moran, 7 Clarke (Iowa), 236; Tulley v. People, 6 Mich. (2 Cooley) 173; State v. Reddick, 7 Kansas, 143; State v. Redman, 17 Iowa, 329; Hall v. State, 50 Ala. 698; Robertson v. State, 42 Ala. 509 (by statute); Hogan v. State, 30 Wisc.

437; Isbell v. State, 31 Tex. 138; State v. Verrill, 54 Me. 408; State v. Oliver, 2 Houston, 585; State v. Dowd, 19 Conn. 388; State v. Cleveland, 58 Me. 564 (by statute); Dick v. State, 3 Ohio St. 89 (by statute); Brown, *in re*, 32 Cal. 48 (by statute), and other cases cited *infra*, § 900. In Missouri only the minor degrees need be specially found. State v. Brannon, 45 Mo. 329.

<sup>2</sup> Com. v. Earle, 1 Wharton, 525.

<sup>3</sup> Johnson v. Com. 24 Penn. State R. (12 Harris) 386; S. P. State v. McCormick, 27 Iowa, 402.

<sup>4</sup> Green v. Com. 12 Allen, 155.

<sup>5</sup> Kennedy v. People, 39 N. Y. 245.

<sup>6</sup> *Infra*, § 900.

of the court in this relation are elsewhere discussed, and it is shown that while where there is absolutely no evidence of guilt of a particular grade the court should direct an acquittal, yet that, unless there is neither evidence nor inference pointing to a particular grade, the court has no right to exclude such grade from the consideration of the jury.<sup>1</sup> Indeed, in view of the law heretofore stated that the distinction between murder in the first and murder in the second degree depends upon the mental capacity of the defendant at the time of the offence to form a distinct intent, and that this capacity can be only inferentially determined, it would be hard to conceive of a case in which a judge would be justified in telling the jury they cannot convict of murder in the second degree. He is entitled, however, freely to express his opinion as to the grade, provided he do not do so as a peremptory direction.<sup>2</sup>

<sup>1</sup> Whart. Cr. L. 7th ed. § 3163 *a*; cited *infra*, § 584; *Com. v. Twitchell*, *McNevin v. People*, 61 Barb. 307; 1 *Brewster*, 552; and see *supra*, § 186. *Burdick v. People*, 58 Barb. 51; *Harris v. State*, 47 Missis. 318; *Lane v. Com.* 59 Penn. St. 371; *Jones v. Com.*,  
<sup>2</sup> See *Jones v. Com.*, *infra*, § 584, Whart. Cr. L. 7th ed. § 3163 *a*.

## CHAPTER VI.

### RIOTOUS HOMICIDES.

When war is levied against government for private purposes, and killing follows, indictment should be for homicide, § 200.

All rioters principals in killing when in pursuance of common design, § 201.

But not liable for independent crimes, § 202.

Presence without intent to kill involves manslaughter, § 203.

Killing by lynch-law, murder in first degree, § 204.

"Hot blood" no extenuation without adequate provocation, § 205.

If there be cooling time, hot blood no extenuation, § 206.

Killing innocent third parties homicide, according to intent of offender, § 207.

§ 200. *When war is levied against government for private purposes, and killing follows, indictment should be for homicide.* — When an unlawful assemblage takes place for the redress of a supposed public wrong, and particularly where its object is the extinction of government, the destruction of judicial process, or the resistance of executive authority as such, participation in it, to the extent of levying war against the government for these public purposes, becomes treason. Where, however, the intention is to redress a private or social grievance, and to incidentally resist process merely so far as may be necessary to effect the private or social end, the offence amounts not to the dignity of treason, and if during its commission life is lost, the offender must be tried for homicide. Two observations, however, may properly be made in this connection. (1.) Even supposing treason exists, the felony of murder or manslaughter does not *merge* in it. Merger only exists where a misdemeanor and a felony form a constituent part of the same act, as where an attempt to commit a larceny and the larceny itself unite. In such cases it is the felony alone that can be prosecuted. But *two* felonies cannot thus coalesce, for being each of equal dignity, neither sinks into the other. (2.) The domains of treason have become restricted within limits which exclude the great mass of those cases of general riot, which were formerly included within the term. It has already been noticed that during the necessities of civil war in England, each government for the time in power, acting on the principle that self-preservation is the duty of all governments,

followed its predecessors in pushing the law of treason to its extreme verge, both as regards principle and temper. But in more recent days, when the crown no longer feels it to be a contest for life between it and the state prisoner at the bar, the old policy has been relaxed, and "levying war," in the definition of treason, is shorn of the constructive element, and restricted, as the term suggests, to the actual making of war against the state. The same amelioration of judicial construction has taken place, also, in our own country. In the earlier treason cases in Pennsylvania, those of Roberts and Carlisle, which were tried in revolutionary times, the early English precedents were cited with approbation and adhered to with rigor. In Fries's trial, which took place during the administration of John Adams, when the government was scarcely settled, the same general views were expressed which obtained in England during the civil wars, and a local opposition to the execution of the window tax was construed to be a "levying war" against the government of the United States. But in Hanway's case, the circuit court of the United States, sitting in Philadelphia in 1851, after noticing the fact that the better opinion in England now is that the term "levying war" should be confined to insurrections and rebellions for the purpose of "overturning the government by force and arms," went on to say that a combination on the part of certain citizens, in a particular neighborhood, to aid fugitive slaves in resisting their capture, even though such resistance results in murder and robbery, is not treason.<sup>1</sup> And aside from the fact that an exact construction of the constitutional definition of treason requires such a conclusion, sound policy, when a particular offence may be prosecuted either as homicide or treason, requires that homicide should be selected for trial, as less likely to provoke political issues, and more likely to secure an impartial verdict. It is apprehended, therefore, not only from the present tendency of the courts, but from the growing experience of government, that trials for treason will hereafter be limited to cases of direct opposition to government *as* government; and that in all cases of riotous crime, the constituent offence against society or individual right, will be selected as the exclusive object of prosecution. And this view, expressed in a former edition of this work, is strengthened by our judicial action during the late

<sup>1</sup> U. S. v. Hanway, 2 Wall. Jr. 144; Wh. C. L. 7th ed. § 2725.

civil war. Multitudes of cases existed in which prosecutions for treason could have been instituted. In only two or three cases, however, were there convictions of treason, and in each of these cases an executive pardon followed.

Homicides occurring during the prosecution of unlawful assemblages may therefore be discharged at the outset from all considerations connected with the law of treason. For the purposes of practical consideration they will be divided into the following heads :—

I. The responsibility incurred by individuals who, though not actually and specifically parties to the overt act, are present and consenting to the assemblage by whom it is perpetrated.

II. How far provocation affects the degree.

I. — § 201. *Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when killing is in pursuance of common design.*

“When divers persons,” says Hawkins, “resolve generally to resist all opposers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions who unlawfully engage in such bold disturbances of the public peace, in opposition to, and defiance of the justice of the nation.”<sup>1</sup>

The joint responsibility of rioters for each other's misconduct rests on the principle that when an act is committed by a body of men engaged in a common enterprise, such act is treated as if specifically committed by each individual. Thus, if several persons conspire to seize, with force and violence, a vessel, and run away with her, and if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present aiding and abetting in executing the design.<sup>2</sup>

<sup>1</sup> 1 Hawk. P. C. c. 31, s. 51; *infra*, St. 583; *Ruloff v. People*, 45 N. Y. § 338; *Staundf.* 17; 1 Hale, 439 *et seq.*; 213; *Washington v. State*, 36 Ga. 4 Black. Com. 200; 1 East P. C. c. 55, 222; *U. S. v. Ross*, 1 Gallis. 624; s. 33, p. 257; *R. v. Archer*, 1 F. & F. Brennan *v. People*, 15 Ill. 511. 351; *State v. Simmons*, 6 Jones (Law), <sup>2</sup> *U. S. v. Ross*, 1 Gallis. C. C. R. N. C. 21; *Huling v. State*, 17 Ohio 624.

§ 202. *But not liable for independent crimes.*—It should be observed, however, that while the parties are responsible for collateral acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus, if one of the party, of his own head, turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt.<sup>1</sup> So where several men were engaged in England in night poaching, which is there a misdemeanor, and in a scuffle occurring with a game-keeper, he was killed by a shot from one of them, it was held that even supposing the gun was fired intentionally by the person holding it, the other defendants were not liable even for manslaughter, the act being collateral to their common design, and none of them being concerned in such act.<sup>2</sup> So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife, and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended any injury to the person killed, the judges were of opinion that the other could not be guilty, either as principal or accessory; and he was acquitted.<sup>3</sup> So it must at the same time be

<sup>1</sup> 1 Hawk. c. 31, s. 52; *State v. King et al.* 2 Rice's S. C. Digest, 106; and see *infra*, § 328, 329.

<sup>2</sup> *R. v. Skeet*, 4 F. & F. 931. See also remarks of Bigelow, C. J., *Com. v. Campbell*, 7 Allen, 541; and *infra*, § 338.

<sup>3</sup> 1 Hawk. P. C. c. 31, 52.

The following English cases on this point deserve careful examination:—

A party of five poachers having been met by a keeper and his assistant, some words had passed, when three of the party ran in upon the keeper, knocked him down, and stunned him; and when he recovered himself, he saw all of them coming by him, and one said, "Dam'em we've done 'em;" and when they had got two or three paces beyond him, one of

them turned back and wounded the keeper in the leg, and then the men set off and ran away; *Bolland, B.*, told the jury if they thought the prisoners were acting in concert, they were all equally guilty of inflicting the wound. *R. v. Warner*, R. & M. C. C. R. 380; *S. C.* 5 C. & P. 525.

Where the whole of a party of poachers set upon and beat a keeper till he was senseless, and having left him lying on the ground, one of them, after they had gone a little distance, returned, and stole his money, it was holden that he alone was guilty of the stealing. *R. v. Hawk*, 3 C. & P. 394.

Two private watchmen, seeing the prisoner and another man with two carts laden with apples, which they suspected had been stolen, went up to

remembered that to make out the *corpus delicti* in such cases it is essential to show that the party charged struck, either actually

them, and one walked beside the prisoner, and one beside the other man, at some distance from each other, and while they were so going along, the prisoner's companion stepped back, and with a bludgeon wounded the watchman he had been walking with; Garrow, B.: "To make the prisoner a principal the jury must be satisfied that when he and his companion went out with a common illegal purpose of stealing apples they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavor to apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal." *R. v. Collison*, 4 C. & P. 565.

Where the prisoners were hired by a tenant to carry away his goods to prevent a distress, and went armed with bludgeons and other offensive weapons; and the landlord, assisted by others, attempted to prevent it; and in the violence of the affray, after the constable had in vain attempted to disperse them, a boy standing at his father's door, who took no part therein, was killed by one of the company unknown; *Holt, C. J., and Pollexfen, C. J.*, held it murder in all the party, by reason that the prisoners came armed with offensive weapons, and in a riotous way, and that they persisted in the affray after the constable had interfered to put a stop to it. But the majority of the judges held, that as the boy was unconcerned in the affray, the killing of him could not be imputed to the rest, who were merely

engaged in the general affray; that he could not be deemed an opposer to the party, so as to make him an object of this contention; and that they could no more be said to have abetted the killing of him than if one of the company had killed a person looking out of a window. The reasoning of the majority in the above case seems to have proceeded upon the defect of any evidence to show, that the stroke by which the boy was killed was either levelled at any of the opposing party, but had hit him by mistake, or was levelled at him upon the supposition that he was one of the opponents; for otherwise it seems that in either of these cases the same guilt would have attached upon all who were concerned in the same design with the striker as upon the striker himself. For if the act or design be unlawful and premeditated, and death happen from anything done in the prosecution of it, it is clearly murder in all who take part in the same transaction. In the above case the two chief justices were of opinion, in which the others did not differ from them, that though the moving of the goods might be lawful, yet the continuing of the party together after the constable had ordered them to disperse was unlawful; and besides, that the great numbers who were thus assembled, and the unusual weapons they were armed with, did also make the assembly unlawful. Perhaps the more correct method, according to Mr. East, would have been for the jury to have found the fact— one way or other, whether the stroke which killed the boy were or were not aimed at any of the assailants, or levelled at him mistaking him to be such. 1 East P. C. 259; *Rex v. Hodgson & others*, 1 Leach, 6. See Plum-



or constructively, the fatal blow, and consented to the common design. Thus it has been correctly held in England, that when two or more, one of whom has received a provocation (as a blow) which would reduce homicide to manslaughter, are all

mer's case, Kelw. 109; 12 Mod. 629; Thompson's case, Kel. 66; Anon. cited by Holt, C. J. 1 Leach, 7, note (a), and a case Anon. 8 Mod. 165. See also Kelw. 161, and Borthwick's case, Dougl. 202.

The prisoners, eight in number, each having a gun, upon being found poaching by some keepers, who went towards them for the purpose of apprehending them, formed into two lines, and pointed their guns at the keepers, saying they would shoot them; a shot was then fired, which wounded a keeper, but no other shot was fired; it was objected that it was clear that there was no common intent to shoot this man, because only one gun was fired, instead of the whole number; Vaughan, B., said: "That is rather a question for the jury, but still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the game-keepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it." *R. v. Edmonds*, 3 C. & P. 390.

Two poachers were apprehended by some game-keepers, and being in custody, called out to one of their companions, who came to their assistance and killed one of the game-keepers, it was held that this was murder in all, though the blow was struck while the two were actually in custody, but that it would not have been so, if the

two had acquiesced and remained passive in custody. *R. v. Whithorne*, 3 C. & P. 394.

Upon an indictment for maliciously cutting, — the question being, how far one prisoner was concurring in the act of the other, — Park, J., told the jury that "If three persons go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out." *Duffy's case*, 1 Lew. 194.

Several persons were engaged in a smuggling transaction; and upon an attempt to oppose their design by the king's officers, one of the smugglers fired a gun, and killed one of his accomplices. It was determined by the court, that if the gun were discharged at the king's officers in prosecution of the original design, which was a fact to be found by the jury, it would be murder in them all, although one of the accomplices happened to be killed. But if done intentionally and with deliberation against the accomplice, from anger or some precedent malice in the party firing, it would be murder in him only. In order, therefore, to affect the particular case by the general purpose in view at the time the death happened, the killing must be in pursuance of such unlawful purpose and not collateral to it. *Plummer's case*, Kel. 109; 12 Mod. 627; 1 Hale, 443. See, as to cases of affrays, ante, 77-82.

charged with murder, and it cannot be proved which of them inflicted the fatal blow, neither of them can be convicted of murder, without a proof of a common design to inflict the homicidal act ; nor of manslaughter, without proof of a common design to inflict unlawful violence.<sup>1</sup>

§ 203. *Presence without intent to kill involves manslaughter.* — The most ordinary case of a riot of this character is that of a sudden popular movement got up for the purpose of redressing some supposed grievance. The temper of a particular class is aroused by an outrage real or supposed, which they design to summarily punish. Cases of this character fall under two heads : first, where the design is to inflict injury on the person or property ; and secondly, where the object is death. If, as in the first case, a body of men, influenced by resentment, proceed to tear down an offensive building, or to remove certain objectionable obstructions, or even to inflict bodily violence short of death, each member is as responsible for the act of death, as if he himself was the sole agent. Nor does this complicity extend only to those who were united at the outset in the common design. Stragglers and idlers caught up by the mob in its progress become involved in its guilt, to the very extent that they are aware of its general purpose. Any other principle would not only secure indemnity for such crimes, but would destroy all efficiency in government. It is true that a man who inadvertently joins a crowd passing along the street is not responsible for a murder committed by one of the number, if he is ignorant that they constitute an unlawful assembly. But such ignorance cannot exist after an order for dispersion is given by the lawful authorities. The man who, after such a moment, remains a passive spectator, is as responsible as he who takes an active part. For indeed it is from this very class of men the *power* of a mob is derived. The immediate mischief in riots in this country and England has been always effected by a very few individuals ; but the real harm has been done by the mass of passive spectators who prevent the prominent offenders from being reached by the police, and who, by their apparent sympathy, encourage the wrongdoers, and produce the impression on the well disposed, that what really is a small knot of reckless outlaws, is a well organized and respectable band of citizens seeking “redress” by their own

<sup>1</sup> R. v. Turner, 4 F. & F. 339. See *infra*, § 318.

agency. It will be readily seen, therefore, that under such circumstances, both the policy of society and the principles of justice require that responsibility should be *joint*. And indeed any reasoning that makes one individual responsible, makes all. Supposing, for instance, the object is to tear down a house, and in the process of destruction a person is killed by a stone cast at the building. In this case the individual who throws the stone may say with perfect truth that he never intended to kill. But the common law treats at least as manslaughter all killing when in performance of an unlawful act, and the "unlawful act" in this case is the riotous assemblage, of which the passive, though acquiescing spectator is as much a component part as the prime mover. If the "unlawful act" is one of the felonies enumerated in the statutes already noticed,<sup>1</sup> and there is an intent grievously to hurt, then the offence may be murder in the first degree.<sup>2</sup>

§ 204. *Killing by lynch-law is murder in the first degree.* — When the object is to inflict capital punishment, by what is called lynch-law, all who consent to the design are responsible for the overt act.<sup>3</sup> It is not necessary to say that under our laws this is murder in the first degree when not executed in hot blood. Of all species of homicide it is the one that most strikingly combines the two distinctive features of that type, — viz., deliberation and a specific intent to take life.

## II. HOW FAR PROVOCATION AFFECTS THE DEGREE.

The question here opened is one which involves some of the most important principles in the law of individual homicide, and which are elsewhere fully considered.<sup>4</sup> It is proposed at present to notice them very briefly in the following relations : —

1. Hot blood.
2. Cooling time.
3. Right of private persons to kill rioters.
4. Death of innocent third parties.

§ 205. 1. *Hot blood.* — "Hot blood" is no excuse, unless it is attended with sufficient provocatory causes. Such causes, when taken in connection with riotous homicide, are comparatively lim-

<sup>1</sup> Supra, § 164.

v. Jenkins, 14 Rich. (S. C.) 213. See

<sup>2</sup> See Brennan v. People, 15 Ill. 511; infra, § 338.

Patten v. People, 18 Mich. 314; State

<sup>3</sup> See State v. Wilson, 38 Conn. 126.

<sup>4</sup> See infra, § 393.

ited. Hereafter they will be considered so far as they relate to public and private wrongs. At present it is sufficient to consider them in connection with those affrays in which bodies of men are engaged with each other. When death occurs through a collision of groups of heated partisans between whom there has long been a grudge, — when such death is produced incidentally by an instrument not necessarily mortal, — and when this death, therefore, is connected with a passionate impulse arising from a temper already morbid with old griefs, — the offence is manslaughter. And so also if on a collision arising one or more of the parties hurries to his home, and still under the influences of passion, fetches fire-arms, and there kills another, the offence is but manslaughter. For when there is hot blood caused by a collision with a hostile party to any extent equal in strength, the law in its tenderness makes allowance for it by lowering the degree. It should be observed, however, that where one party is greatly superior to the other in strength, the former cannot be allowed the benefit of such a defence.<sup>1</sup> A party has no right to entertain “hot blood” against one who is greatly his inferior in strength, and who has not the means of inflicting serious injury; to allow such a defence to be set up, would be to permit a wanton tyranny of the strong over the weak. It is true, in *Stedman's case*, it was held that where a woman, in return for words of gross provocation, struck a soldier with an iron patten on the face, who thereupon killed her, the crime was only manslaughter.<sup>2</sup> But this case has been very properly doubted by an eminent judge of our own day and country,<sup>3</sup> who says, in entire accordance with both the policy and the reason of the law, “If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife upon her husband would bring the killing below murder.” And this distinction is particularly applicable to cases of popular affrays. When there are two factions (*e. g.* the Orange and Roman Catholic Irish, who were the contending actors in the riots in Philadelphia in 1844), who are in a state of partisan warfare, as long as either acts in hot blood, the law takes compassion on this infirmity, and lessens the degree of

<sup>1</sup> See *infra*, § 425.

<sup>2</sup> *Gibson, C. J., Com. v. Mosler, 4*

<sup>3</sup> *R. v. Stedman, Fost. 292; 1 Hale, Barr, 268.*  
457; *infra*, § 425-35.

homicide to manslaughter, provided there is no cooling time, and no premeditated use of deadly weapons. But where there is a marked preponderance in strength on the one side or the other, no degree of supposed provocation can relieve from the guilt of murder the individuals of an armed mob, which undertake thus to follow up a supposed enemy. Yet, even though the original assailants are guilty of murder, a person who in hot blood rushes in to aid them is responsible only for manslaughter for a killing which takes place after he joins them.<sup>1</sup>

§ 206. 2. *Cooling time.*<sup>2</sup>—The authorities agree that if there is time to cool, taking in view all the circumstances, hot blood cannot be set up. Even supposing a murderous attack by one individual on another, or of one body of men upon another, if the party assailed has retreated so as to be out of danger, and is secure from further personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new conflict with the aggressor. If he do, and slay his assailant, the offence will be murder or manslaughter, according to the particular circumstances.<sup>3</sup> Where the whole proceeding is infected with a continuous public excitement, and where the return to the conflict is so immediate and so associated in sentiment as to form part of the same transaction with the original assault, the law applies the original provocation to the fatal blow. What interval of time is necessary to exclude the hypothesis of continuousness is, of course, dependent upon the circumstances of the case and the temperament of the individuals. But a good test is the interposition of other subject matters in the mind, and its intermediate voluntary adoption of different topics. Thus, it has been ruled that if between the provocation received and the mortal blow given, the prisoner fall into other discourse or diversion, and continue so a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his attention was once called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is

<sup>1</sup> *Supra*, § 202; *infra*, § 328; *Thompson v. State*, 25 *Alab.* 41; *Frank v. State*, 27 *Alab.* 38.

point is discussed in its general relations.

<sup>2</sup> *Infra*, § 444, 448.

<sup>3</sup> See *infra*, § 393 *et seq.*, where this

used, is murder.<sup>1</sup> It is obvious, therefore, that no measurement of time can be adopted in this respect. In periods of great public excitement, when men's minds have been so absorbed with a particular topic as to be incapable of considering anything else, it takes a much greater period to cool after a supposed provocation than under ordinary circumstances. Care, however, should be taken in this as well as in all similar cases, lest the public excitement be used as a cloak for private cupidity or revenge.<sup>2</sup>

§ 207. 3. *Private persons may kill in suppression of riot.* —The law, as we will hereafter observe,<sup>3</sup> is that private citizens may, of their own authority, lawfully endeavor to suppress a riot, and for that purpose may even arm themselves, and that whatever is honestly done by them in the execution of that object will be supported and justified by the common law. And as is well stated by Judge King, in one of the charges which will be given hereafter, even supposing there be no *public* organization, yet if one man sees another in the act of burning a church or dwelling-house, or attempting to commit a murder, he has not only the right, but it is his duty to endeavor to prevent him.<sup>4</sup> If the perpetrator resists, so as to make violence necessary in order to the prevention, the circumstances are a sufficient sanction and exculpation for the consequences of the violence, to *whatever degree it may extend*. But several qualifications to this position should always be kept in mind. In the first place, where there exist public officers, having jurisdiction, who will discharge their respective duties, it is proper for the voluntary police to put itself under their direction. "It would be more discreet," it was said during the London riots, "for every one in such case to be assistant to the justices and sheriffs in doing so." Of course this qualification does not exist where the proper authorities either will not act at all, or are themselves *malcontent*. In the second place, while this might extend to the *prevention* of crime, it does not include its punishment. Citizens, when acting either individually or in a body for such purposes, are bound, if they make an arrest, to lodge the offender in the common jail, or detain in safe keeping till the proper authorities can act.<sup>5</sup> And,

<sup>1</sup> *Com. v. Green*, 1 Ashm. 289. See *infra*, § 448.

<sup>2</sup> See *infra*, § 438-440.

<sup>3</sup> See *infra*, § 213-5.

<sup>4</sup> See *infra*, § 213.

<sup>5</sup> *State v. Roane*, 2 Dev. 58. See *infra*, § 213-4, 259.

thirdly, when there is an opportunity to appeal to law, no public or social grievance, no matter how galling, will excuse homicide committed in its redress.<sup>1</sup>

§ 208. 4. *Killing third parties.*—Where an unlawful assembly resorts to the use of deadly weapons, and death ensues to innocent third parties, it seems that such a homicide is murder at common law, supposing the guilt of the offender is not extenuated by such a state of hot blood as would reduce the grade to manslaughter. It has indeed been intimated that such a homicide would be murder at common law, without any qualification from the state of the blood. The true view, however, is, that it is not the character of the deceased, but the relation and position of the offender, that determines the grade. Thus, for instance, if a man intending to kill a person attempting to commit a forcible and obvious crime against his person or property, by mistake kill one of his own family, it is homicide by misadventure only.<sup>2</sup> And the same reasoning indicates that where a man in hot blood slays an innocent bystander in mistake for a supposed assailant, the offence is but manslaughter.<sup>3</sup> But be this as it may, it is clear that if by an unlawful assembly, the object of which is to kill or grievously hurt all who may oppose its movements, an innocent third party be killed, it is murder at common law, unless there be hot blood, and that whatever be the grade of the offence, it is shared by all individuals engaged in the affray. If, as has been well stated in Hare's case, and will presently be fully seen, the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, this would defeat justice and give immunity to guilt. Suppose, for instance, "a fight with fire-arms between two bodies of enraged men should take place in a public street, and from a simultaneous fire, innocent citizens, their wives or children in their houses, should be killed by some of the missiles discharged,—shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such out-laws,—You are equally involved in all the consequences of your

<sup>1</sup> *Infra*, § 488.

<sup>2</sup> *Infra*, § 213-4, 259, 260.

<sup>3</sup> See cases to this effect *supra*, § 493-5.

assaulting the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the public highway of a thickly populated city, are they to have the benefit of impracticable niceties, in order to their indemnity from the consequences of their own conduct?" It was said, however, that such homicide, in any view of the case, would not be murder in the first degree, as there would be wanting that specific malice which is necessary to constitute that offence. If, however, there is a *deliberate* killing of an innocent third party, knowing him to be such, the offence is murder in the first degree.<sup>1</sup>

<sup>1</sup> See *supra*, § 170.



## CHAPTER VII.

### HOMICIDE BY OFFICERS OF JUSTICE.

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| <p><b>I. IN OBEDIENCE TO WARRANT, § 210.</b><br/>         Killing in obedience to a writ of execution justifiable, § 210.</p> <p><b>II. IN EFFECTING AN ARREST, § 212.</b><br/>         Officer in civil process chargeable with murder if intentionally killing a person flying from arrest, § 212.<br/>         But if officer's life be jeopardized, killing is excusable, § 212.<br/>         In criminal arrests for misdemeanors the same rule applies, § 213.<br/>         An honest and non-negligent belief that a felony is about to be perpetrated excuses a homicide (even by a private citizen) in prevention, § 213 a.</p> <p><b>III. IN PREVENTION OF AN ESCAPE, § 214.</b><br/>         Killing by officer justifiable in prevention of an escape, § 214.</p> <p><b>IV. IN PRESERVATION OF PEACE, § 215</b><br/>         Killing justifiable when necessary to preserve peace, § 215.</p> | <p><b>V. WHEN ACTING IMPROPERLY OR WITH UNNECESSARY SEVERITY, § 216.</b><br/>         In such case offence is murder or manslaughter, § 216.</p> <p><b>VI. WHEN ACTING WITHOUT AUTHORITY, § 217.</b><br/>         Officer killing without legal warrant cannot excuse himself on ground of his office, § 217.<br/>         Private persons responsible who arrest innocent persons on charge of felony, § 218.<br/>         Military and naval officers killing without jurisdiction, guilty of murder, § 219.</p> <p><b>VII. WHEN ACTING IN SELF-DEFENCE, § 220.</b><br/>         Officer, when in danger of life may kill person charged with misdemeanor attempting to escape, § 220.</p> |
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#### I. IN OBEDIENCE TO WARRANT.

§ 210. *Killing in obedience to warrant of execution justifiable.*

— Homicide committed by the sheriff in execution of a warrant to that effect is of course justifiable, entitling him to an acquittal. It is important to observe, however, that the judgment and sentence must be strictly followed, since if death is inflicted otherwise than directed the officer will be guilty of felony, at least, if not of murder.<sup>1</sup> If the judgment be to be hanged, and the officer behead the party, it is said to be murder;<sup>2</sup> and in England even the king was held not to be able to change the punishment of the law by altering the hanging or burning into beheading, though, when beheading is part of the sentence, he may remit

<sup>1</sup> 1 Hale, 501; 2 Hale, 411; 3 Inst. 52, 211; 4 Black. 179. See Whart. C. L. 7th ed. § 3400.

<sup>2</sup> 1 Hale, 433, 454, 466, 501; 2 Hale, 411; 3 Inst. 52; 4 Black. Com. 179.

the rest.<sup>1</sup> The better opinion seems to have been that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the English common law;<sup>2</sup> and that though the king cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it; and accordingly that an officer, acting upon a warrant from the crown for beheading a person under sentence of death for felony, would not be guilty of any offence;<sup>3</sup> and it was in earlier days the practice, founded in humanity, when women were condemned to be burned for treason, to strangle them at the stake before the fire reached them, though the letter of the judgment was that they should be burnt in the fire "*till they were dead*."<sup>4</sup> The 30 Geo. 3, c. 48, now directs that they shall be fined as other offenders. The rule may still apply to an officer varying from the judgment of his own head, and without warrant or the color of authority. If an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter.<sup>5</sup>

## II. IN EFFECTING AN ARREST.

§ 211. As a general principle, officers of the law when their authority to arrest or imprison is resisted, will be justified in opposing force to force if death should be the consequence;<sup>6</sup> yet they ought not to come to extremities upon every slight interruption, without a reasonable necessity.<sup>7</sup> If they should kill where no resistance is made it will be murder; and the same rule will exist if they should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled.<sup>8</sup>

The cases under this head may be classed as follows:—

1. Civil.
2. Criminal.

<sup>1</sup> 3 Inst. 52; 2 Hale, 412.

<sup>2</sup> Fost. 270; F. N. B. 244, h; 19 Rym. Fæd. 284.

<sup>3</sup> Fost. 268; 4 Black. Com. 405; 1 East P. C. c. 5, s. 96, p. 335.

<sup>4</sup> Fost. 268.

<sup>5</sup> 1 Hawk. P. C. c. 29, s. 5.

<sup>6</sup> 1 Black. C. 180; State v. Garrett.

Winston N. C. 144; Wolff v. State, 18 Ohio St. 298; State v. Anderson, 1 Hill S. C. 327; R. v. Dadson, 2 Den. C. C. 35.

<sup>7</sup> 1 East P. C. 297.

<sup>8</sup> 1 Hale, 481; Fost. 291.

§ 212. I. CIVIL. *Officer killing a person flying from civil arrest chargeable with murder, if intending to kill.*—In civil suits, if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer, not being able to overtake him, make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it has been said that it will amount to murder.<sup>1</sup> But this is an extreme case; for the same authorities inform us that if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence;<sup>2</sup> and if there be resistance, and an affray ensue, during which the party sought to be arrested is slain, the offence will be but manslaughter. Thus in a leading case, which has been the cause of much discussion, but which when all the facts are considered is in conformity with the general line of authority, Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up-stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying: "He did not intend to hurt the officers, but he would not be ill-used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and, words of anger arising, Lutterel struck one of the officers on the face with a walking cane and drew a little blood. Whereupon both of them fell upon him: *one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manslaughter, *by reason of the first assault with the cane*; but Mr. Justice Foster thinks it a very extraordinary

<sup>1</sup> 1 Hale, 481; Fost. 291.

<sup>2</sup> R. v. Tranter, Stra. 499.

case, as thus reported ; and mentions the following additional circumstances, which are stated in another report. 1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought them down, because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot (for both pistols were discharged in the affray), and slightly wounded on the wrist by some sharp pointed weapon, and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Mr. Lutterel's begging for mercy was not, that he was on the ground begging for mercy, but that on the ground he held up his hands *as if* he was begging for mercy. Upon these facts the chief justice directed the jury, that if they believed Mr. Lutterel endeavored to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done if the debt had not been paid, or bail given, he declared it would be no more than manslaughter.<sup>1</sup>

If a party liable to civil arrest put in jeopardy the lives of those seeking lawfully to arrest him, his homicide will be excusable.<sup>2</sup>

§ 213. II. CRIMINAL. *In pursuit of criminal charged with misdemeanor same rule applies.*— A distinction here exists between cases of misdemeanor and felony. In the former (with the exception, however, of cases of riotous misdemeanors), it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken. Under such circumstances (the deceased only being charged with a misdemeanor) killing him intentionally is murder ; but the offence will amount only to manslaughter, if it appear that death was not intended.<sup>3</sup> In a leading case of this class it has been ruled that it is no excuse for killing a man that he was out at night as a ghost, dressed in white, for the purpose of alarming the neighborhood, even though

<sup>1</sup> *Fost.* 293-4.

<sup>2</sup> 1 *East P. C.* 302. See *State v.*

<sup>3</sup> *State v. Anderson*, 1 *Hill S. C.* 327. *Oliver, Houst.* 585.

he could not otherwise be taken. The neighborhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and upon meeting with a person dressed in white, immediately shot him. M'Donald, C. B., Rooke, and Lawrence, JJ., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the court said that they could not receive that verdict, and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced; but the prisoner was afterwards reprieved.<sup>1</sup>

Where resistance is made, yet if the officer kill the party after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter.<sup>2</sup>

§ 213 a. *Otherwise in respect to felonies.* — An honest and non-negligent belief that a felony is about to be perpetrated will extenuate a homicide committed in prevention of it, though the defendant be but a private citizen,<sup>3</sup> but not a homicide committed in pursuit, unless special authority be given, or the pursuit be conducted according to law.<sup>4</sup> So far as concerns officers, where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. But the slayer in such cases, especially if he be a mere pursuer, must not only show that a felony was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest.<sup>5</sup>

<sup>1</sup> R. v. Smith, 4 Black. Com. 201 . 457; Selfridge's Trial, 160; R. v. (note). Haworth, 1 Mood. C. C. 207; R. v.

<sup>2</sup> 1 East P. C. 525.

Williams, Ibid. 387; R. v. Longden, R. & R. 228.

<sup>3</sup> *Infra*, § 259-262, 279, 493, 537; Pond v. People, 18 Mich. 150; Oliver v. State, 17 Ala. 487; Dill v. State, 25 Ala. 15; 1 East P. C. 259.

<sup>4</sup> State v. Roane, 2 Dev. 58; R. v. Hagan, 8 C. & P. 167; U. S. v. Trav- ers, 2 Wheel. C. C. 510.

<sup>5</sup> State v. Rutherford, 1 Hawkes,

## III. IN PREVENTION OF AN ESCAPE.

§ 214. *Killing by officer justifiable in prevention of escape.* — When a felony has been committed and the offender is in duress, the officer is bound to make every exertion to prevent an escape; and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable.<sup>1</sup> This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if, in these cases, fresh pursuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. The same rule holds, if a felon, after arrest, break away as he is carried to jail, and his pursuers cannot retake without killing him. But if he may be taken, in any case, without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not.<sup>2</sup>

Jailers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore, an assault upon a jailer, which would warrant him (apart from personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent.<sup>3</sup>

Jailers and their officers are under the same special protection as other ministers of justice; but in regard to the great power which they have, and, while it is exercised in moderation, ought to have, over their prisoners, the law watches their conduct with a jealous eye. If a prisoner under a jailer's care die, whether by disease or accident, the coroner, upon notice of such death, which notice the jailer is obliged to give in due time, ought to resort to the jail; and there, upon view of the body, make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the jailer or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such du-

<sup>1</sup> 1 East P. C. 302; U. S. v. Jailer, Hawk. c. 12, § 1; 4 Black. Com. 180; 2 Abbott U. S. 286.

<sup>3</sup> Inst. 118, 220-1; U. S. v. Jailer, 2

<sup>2</sup> 1 Hale, 481, 489; 2 Hale, 75-6, 91, 101-2; Fost. 271, 309; Stat. 9 Anne, c. 16; 1 Hawk. c. 28, § 11; 2

Abb. U. S. 286.

<sup>3</sup> 1 Russ. on Cr. 644.

ress.<sup>1</sup> The person *guilty* of such duress will be the party liable to prosecution ; because, though in civil suit the principal may in some cases be answerable in damages to the party injured through the default of the deputy, yet, in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults.<sup>2</sup> And so where a jailer, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the distemper, of which fact the jailer had notice, caught the distemper, and died of it ; this was holden to be murder.<sup>3</sup>

As has already been noticed, where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken.<sup>4</sup>

#### IV. IN PRESERVATION OF THE PEACE.

§ 215. *Killing justifiable when necessary to preserve peace.* —

As has been already observed, if officers of the law, when engaged in the preservation of the peace, find it necessary to take life, such homicide is justifiable. The rule is not confined to the instant the officer is on the spot, and at the scene of action engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same ; and, therefore, if he come to do his office, and meeting great opposition, retire, and in the retreat is killed, this will amount to murder. He went in obedience to the law, and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And upon the same principle, if he meet with opposition by the way, and is killed before he come to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence, this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. It follows from these premises, that

<sup>1</sup> Fost. 321. See *R. v. Huggins*, 2 Stra. 882; 2 Ld. Ray. 1574; *R. v. Treeve*, 2 East P. C. 821; *R. v. Barrett*, 2 C. & K. 343; *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449; *R. v. Pelham*, 8 Q. B. 959; Wh. C. L. 7th ed. § 1011.

<sup>2</sup> *R. v. Huggins*, *ut supra*; *R. v. Allen*, 7 C. & P. 153; *R. v. Green*, 7 C. & P. 156; *supra*, § 140.

<sup>3</sup> Fost. 322.

<sup>4</sup> 1 Hale, 481; Fost. 271; *supra*, § 213 a.

if such an officer successfully resists those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty, he is justified, even should the lives of the assailants, their aiders and abettors, be taken, from the necessary extent of the resistance so made.<sup>1</sup>

#### V. WHEN ACTING IMPROPERLY OR WITH UNNECESSARY SEVERITY.

§ 216. *In such case offence is manslaughter or murder.* — An arrest, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder. And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter. In all cases, the officer should proceed with due caution; and although it is not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity, in order to execute his duty. And, therefore, where a collector, having distrained for a duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter, in so far exceeding the necessity of the case. And where no resistance at all is made, and yet the officer kills, it will be murder. So, if the officer kill the party after the resistance is over, and the necessity has ceased, it is manslaughter at least; and if the blood had time to cool, it would, as is stated by Mr. East, be murder.<sup>2</sup>

#### VI. WHEN ACTING WITHOUT AUTHORITY.

§ 217. *Officer killing without legal warrant to arrest cannot excuse himself on ground of his office.* — An officer who makes an arrest out of his proper district, or without any warrant or authority, and purposely kills the party for not submitting to such

<sup>1</sup> King, P. J. — 4 Penn. Law Jour. 488, 494; 2 Hale, 84; Caffé's case, 1 Ventr. 216.

<sup>2</sup> 1 East P. C. 297; 1 Hale, 481,



illegal arrest, will, generally speaking, be guilty of murder in all cases where an indifferent person, acting in the like manner, without any such pretence, would be guilty to that extent.<sup>1</sup>

§ 218. *Private persons responsible who arrest innocent persons on charge of felony.* — As has already been observed in the case of private persons using their endeavors to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; as, if the suspicion be not supported by the fact, the person endeavoring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter.<sup>2</sup>

§ 219. *Military and naval officers killing without authority guilty of murder.* — Within this general principle of amenability fall those cases where there is a killing by military or naval officers without authority.<sup>3</sup> Thus, if a court-martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder.<sup>4</sup>

And so, where the captain of a man-of-war had a warrant for impressing mariners, upon which a deputation was indorsed in the usual form to the lieutenant; and the mate, with the prisoner Dixon, and some others, but without either the captain or lieutenant, impressed one Anthony How, who never was a mariner, but was servant to a tobacconist, and upon How making some resistance, and for that purpose drawing a knife which he held in his hand, Dixon, with a large walking-stick, about four feet long, and a great knob at the end of it, gave How a violent blow on the side of his head, of which he died in about fourteen days; it was adjudged murder. The capture and detention of How were considered as unlawful on two accounts: first, because neither the captain nor lieutenant were present, and Dixon was no lawful officer for the purpose of pressing, nor an assistant to a lawful officer; secondly, because How was not a proper object to be impressed. It was lawful, therefore, under these circumstances,

<sup>1</sup> 1 East P. C. 312; Wh. Cr. L. 7th ed. § 1288; *infra*, § 253. Law, 167. See *R. v. Vaughan*, 9 B. & S. 329; Roscoe's Cr. Ev. 7th ed.

<sup>2</sup> Fost. 318.

767.

<sup>3</sup> *Infra*, § 258; Clode's Military

<sup>4</sup> *Warder v. Bailey*, 4 Taunt. 77.

for How to defend himself ; and Dixon's killing him, in consequence of an unlawful capture and detention, was murder.<sup>1</sup>

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats ; had ammunition given to him when he was put upon guard ; and acted under the mistaken apprehension that it was his duty. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach ; and he received a musket, three blank cartridges, and three balls. The boats pressed, upon which he called repeatedly on them to keep off ; but one of them persisted and came close under the ship, and he then fired at a man who was in the boat and killed him. It was put to the jury to find, whether the sentinel did not fire under the mistaken apprehension that it was his duty, and they found that he did. But a case being reserved, the judges were unanimous that it was, nevertheless, murder. They thought it, however, a proper case for a pardon, and further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.<sup>2</sup>

#### VII. WHEN ACTING IN SELF-DEFENCE.

§ 220. *Officer when in danger of life may kill person charged with misdemeanor attempting to escape.* — Although an officer must not kill for an escape, where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party.<sup>3</sup> Upon a trial for murder it appeared that the prisoner, an excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers, in the act of landing whiskey from the Scottish shore, contrary to law ; the deceased had surrendered

<sup>1</sup> 1 East P. C. 313. See *infra*, § 258.

<sup>2</sup> *State v. Anderson*, 1 Hill S. C. 327.

<sup>3</sup> *R. v. Thomas*, 1 Russ. on Cr. 614.

himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded; the officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault; that, seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not; but the deceased disregarded the warning, and rushed towards him to make a fresh attack; that he thereupon fired a second pistol, and killed him. Holroyd, J., told the jury, "an officer must not kill for an escape, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon, by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is whether, under all the circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to."<sup>1</sup>

<sup>1</sup> Forster's case, 1 Lewin, 187; 1 Russ. on Cr. 643.

## CHAPTER VIII.

### HOMICIDE OF OFFICERS OF JUSTICE, AND OTHERS AIDING THEM.

To intentionally kill an officer of justice legally arresting is murder, § 235.  
But manslaughter when arrest is illegal, § 237.

When intent was not to kill or seriously hurt, then offence is manslaughter, though arrest was legal, § 238.

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VI. HOW FAR THIRD PARTIES MAY ARREST, § 295.

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§ 225. *Murder to intentionally kill an officer legally arresting.*

—When a party who having authority to arrest or imprison, uses the proper means on a proper occasion for such a purpose, and in so doing is assaulted and killed, it will be murder in all concerned if the intent be to kill or inflict grievous bodily hurt. Thus, where an affray had taken place, and a quarterly sergeant appeared and ordered the wranglers to desist, and on their not doing so, reported to the orderly sergeant, who called at the room, and ordered the persons engaged to the guard-house, but the prisoner remained behind on some pretence connected with his clothes, and when the sergeant was temporarily absent declared he would be the death of any one who attempted to take him to the guard-house, retired to a corner of the room where a number of unloaded muskets had been left, loaded one, and when the sergeant entered, with another, accosted him, "Stand off; if you approach, I will take your life." He immediately afterwards fired, and mortally wounded the sergeant and his companion. The case depended on the question whether or not at the time the defendant was legally liable to arrest, and the court, Story, J., and Davis, J., charged the jury that if such was the case, the offence was murder; if otherwise, manslaughter.<sup>1</sup>

§ 226. Sir William Russell thus states the law: Upon these principles it may be laid down as a general rule, that *where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take a part in such resistance*; for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that *resistance* be made; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other

<sup>1</sup> U. S. v. Travers, 2 Wheeler's C. Tex. 542. See Com. v. Drew, 4 Mass C. 495. So also Angell v. State. 36 391.

hand, the persons resisting will be guilty of murder.<sup>1</sup> And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person be slain in endeavoring to keep the peace and suppress the affray, he who kills him will be guilty of murder.<sup>2</sup> But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the king's name to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it;<sup>3</sup> unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed.<sup>4</sup> As if A., B., and C. be in a tumult together, and D., the constable, come to appease the affray, and A., knowing him to be the constable, kill him, and B. and C. not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C.<sup>5</sup> Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder; and such as did not know it, of manslaughter only.<sup>6</sup>

§ 227. *But manslaughter when arrest is illegal.* — If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him; if the party attempting the arrest were a constable it is said in England that the killing is murder;<sup>7</sup> if a private person, manslaughter;<sup>8</sup> the reason given being that the constable has authority, by law, to arrest in such case, but a private person has not. The same rule is applied in all the cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony.<sup>9</sup> But if an arrest, under color of legal authority, be illegally attempted, the better opinion now is that the killing of the person arresting, not in malice, but in resisting the arrest, is but manslaughter.<sup>10</sup>

<sup>1</sup> Fost. 270, 271; 1 Hale, 494; 3 84, 87, 91; and see R. v. Ford, R. & Inst. 56; 2 Hale, 117, 118. R. 329; Drennan v. People, 10 Mich. 169.

<sup>2</sup> 1 Hawk. P. C. c. 31, s. 48, 54.

<sup>3</sup> Fost. 272; infra, § 237.

<sup>4</sup> 1 Hawk. P. C. c. 31, s. 49, 50.

<sup>5</sup> 1 Hale, 438.

<sup>6</sup> 1 Hale, 446; 1 Russ. on Cr. 535.

<sup>7</sup> 1 Hawk. c. 28, sect. 12; 2 Hale,

<sup>8</sup> See 2 Hale, 83, 92.

<sup>9</sup> See Samuel v. Payne, Doug. 359.

<sup>10</sup> Com. v. Drew, 4 Mass. 391;

Tackett v. State, 4 Yerg. 392; Nolen

v. State, 26 Ala. 31; Tooley's case, 2

And where A. unlawfully attempts to arrest B., B. is justified in resisting; and if A. so presses B. as to make it necessary for him to choose between submission and killing A., then the killing A. is not even manslaughter.<sup>1</sup> So if A.'s assault on B. has mixed in it a felonious intent, then B., if necessary to avert the danger, may take A.'s life.<sup>2</sup>

§ 228. *Where intent was not to kill or inflict serious bodily harm, then the offence is but manslaughter, though the arrest was legal.*— Thus in an English case tried in 1873 before Brett, J.,<sup>3</sup> the evidence was that the defendant, together with C., were arrested and handcuffed together by a policeman, the charge being larceny, and the proceedings regular. The policeman attempted to put the defendant in a cart, for removal to the police station. The defendant and C. resisted, struggling violently; and the policeman called in aid and finally threw the prisoners on the ground, and kept them down, and sent for a rope to tie them. The policeman, however, sent away the rope, saying that if the men would go quietly, they should get up. They got up, but said they would not go in the cart, and the policeman then called on D., the deceased man, to aid and assist in taking them away, which he accordingly was about to do. He clapped the men on the shoulders, and told them to go quietly, as it would be a great deal better for them. Porter said angrily to him: "What have you to do with it?" Then he or the other man kicked him violently in the abdomen. The man at once fell backwards. G., the chief witness on this point, admitted that at the time when he was before the magistrates he was not certain which of the men gave the kick, but now he swore it was Porter, and so did the policeman, who also said "he kicked deliberately." Ultimately the men were thrown down, again Porter's legs were tied, and the two men were put into the cart together and taken off to the station. It was not supposed at the time that the man had sustained any injury from the kick, but

Ld. Raym. 314; R. v. Phelps, 1 C. & M. 180; S. C. 2 Mood. C. C. 240; R. v. Patience, 7 C. & P. 775; R. v. Thompson, 1 Moody C. C. 80; Com. v. Carey, 12 Cph. 546; Roberts v. State, 14 Mo. 146; Galvin v. State, 6 Cold. 291; State v. Oliver, 2 Houst. 605.

<sup>1</sup> State v. Oliver, 2 Houston, 604. See this question discussed in principle in Whart. Cr. L. 7th ed. § 1288-1292.

<sup>2</sup> Supra, § 220.

<sup>3</sup> R. v. Porter, 12 Cox C. C. 444; 1 Green's C. R. 155.

in two or three days he died, and a *post mortem* examination showed mortification of the bowels caused by the kick. The defence was that it was uncertain which of the men inflicted the kick, and that as it was inflicted in a scuffle, it was only a case of manslaughter. No point was made as to the putting on of the handcuffs being illegal, and except as showing that it might have irritated the prisoner, it was not relied upon ; and it will be observed that the deceased man was no party to it. Brett, J., charged the jury that “ the men had been given into custody of a police constable, who had legal authority to take them into custody and to call upon others to assist him, and they had no right to resist him, and in resisting him they were doing what was illegal. He directed them distinctly that if the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he was guilty of murder. He directed them further that if the prisoner inflicted the kick in resistance of his lawful arrest, even although he did not intend to inflict grievous injury, he was equally guilty of murder. But if, in the course of the struggle, he kicked the man, not intending to kick him, then he was only guilty of manslaughter. The questions for the jury, therefore, were whether the prisoner inflicted the kick wilfully, and intending to inflict grievous injury, or intending to resist arrest, or whether it was only accidental in the course of the scuffle. The deceased man was entitled to the same protection as the police constable himself. If the jury believed the police constable, the prisoner was clearly guilty of murder, for the policeman swore that he ‘kicked him deliberately.’ If he intended to kick the man, it was hardly possible but that he did it intending at all events to resist arrest. The question really came to this — whether the prisoner really intended to kick the man, for it was hardly possible that he could have intended to kick him, unless he had one or other of these criminal intents, and in either case he was guilty of murder. If, however, they thought that the kick was accidental, in the course of a wild struggle, then he would be guilty only of manslaughter.” The defendant was convicted of manslaughter ; and the learned judge, in passing sentence, noticed the fact that the struggle had not arisen in the resistance to the handcuffing. No doubt, to have unnecessarily handcuffed the defendant was illegal, and would,



if the homicide had occurred in resisting this cruelty, have itself reduced the grade to manslaughter.<sup>1</sup>

§ 229. The subject matter of this chapter will be further considered under the following heads: —

I. Who have authority to arrest.

1st. Officers of justice.

1. Constables and policemen.
2. Bailiffs and tipstaves in civil matters.
3. Officer acting out of jurisdiction.
4. Notice, what constitutes, and effect of want of it.
5. By whom a warrant may be executed.
6. How long a warrant continues in force.
7. When process is illegal.
8. When arrest is made without any warrant.

2d. Ship's officers.

3d. Private persons.

4th. Railway officers.

II. In what cases.

1st. Felonies.

2d. Misdemeanors.

3d. Affrays.

4th. Street-walkers, vagrants, &c.

III. When the arrest may be made.

IV. Officers taking opposite parts.

V. How arrest may be made, and herein of breaking open doors.

VI. How far third parties may resist.

I. WHO HAVE AUTHORITY TO ARREST.

1st. *Officers of Justice.*

1. *Constables and policemen.*

§ 230. The general rule in respect to constables and other peace officers is thus stated by Sir W. Russell: Ministers of justice, as bailiffs, constables, watchmen, &c., while in the execution of their offices, are under the peculiar protection of the law, — a protection founded in wisdom and equity, and in every principle of political equity; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed

<sup>1</sup> See *France v. Wright*, 1 M. & G. 731.

has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. If, therefore, upon an affray, the constable, and others in his assistance, come to suppress the affray and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm: so if the sheriff, or any of his bailiffs or other officers, is killed in executing the process of the law, or in doing their duty, it is murder; the same is the law as to a watchman who is killed in the execution of his office.<sup>1</sup> This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo*; and therefore, if he come to do his office, and meeting with great opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty (which is a fact to be collected from circumstances appearing in evidence), this likewise will amount to murder.<sup>2</sup>

§ 231. A constable who had verbal orders from the magistrates to apprehend all thimble-riggers, attempted to apprehend the defendant and his companions, who were playing at thimble-rig in a public fair, and succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public house, endeavored to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable, calling others to his assistance, broke open the privy and attempted to ap-

<sup>1</sup> 1 Russ. on Cr. 4th ed. 799 *et seq.*; Drew, 4 Mass. 791; U. S. v. Travers, 1 Hale, 456, 460.

<sup>2</sup> Wheeler's C. C. 509.

<sup>3</sup> Fost. 808-9. See also Com. v.

prehend the prisoner, who stabbed one of the party ; it was held that the constable had an authority to apprehend the defendant.<sup>1</sup>

§ 232. In another case, where the defendant took his tools and left his work, saying that he would do for any bloody constable that offered to stop him, and his master applied to a constable to take the defendant, but made no charge against the defendant, and the master and the constable followed the defendant, and found him in a public privy, as if he had occasion there, and the master said : " This is the man, I give you charge of him ; " upon which the constable said : " Your master gives you in charge of me ; you must go with me ; " and the defendant immediately stabbed the constable ; it was holden by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest, when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to make the arrest, was such a provocation as reduced the offence to manslaughter only.<sup>2</sup>

§ 233. A policeman or other officer appointed by the municipal authority for the preservation of order and the prevention of crime, is entitled to the same protection which we have just stated to belong to a constable. Thus, where a policeman saw the prisoner playing the bagpipes in the street at half-past eleven o'clock at night, by which he collected a large crowd round him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor ; it was held, that if the prisoner was collecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand upon his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died ; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing.<sup>3</sup>

§ 234. And so where a policeman between eleven and twelve o'clock at night was called upon to clear a beer-house, which he

<sup>1</sup> R. v. Gardner, 1 Mood. C. C. 890.

<sup>2</sup> R. v. Hagan, 8 C. & P. 167 — Bol-

<sup>3</sup> R. v. Thompson, 1 Mood. C. C. 78 ; *infra*, § 256.

land, B., and Coltman, J. See R. v. Porter, 12 Cox C. C. 444 ; *supra*, § 228.

did, and then went into the street where the prisoner and many others were standing near the door, when the prisoner refused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat; it was held that if the policeman had died this would have been murder, for if a policeman had heard any noise in the beer-house at such a time of night, he would have acted within the line of his duty if he had gone in and insisted that the house should be cleared; and much more so, if he was required by the landlady; and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn to the clearing of the house, and if anything was saying or doing likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so; and if, in so doing, he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening language, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and used threatening language if any one ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place in order to get him to go home; and, therefore, anything that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and, therefore, any blow that was given afterwards with a cutting instrument would be precisely the same as if it had been given without anything being done by the policeman.<sup>1</sup>

2. *Bailiffs or tipstaves in civil cases.*

§ 235. As a general rule, in this class of cases, though an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity; yet, if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means.<sup>2</sup>

<sup>1</sup> R. v. Hems, 7 C. & P. 312—Williams, J.

<sup>2</sup> 1 Hale, 481; Fost. 279; State v. Moore, 39 Conn. 244.

In the case of a *private or special bailiff*, either it must appear that the party knew that he was such officer, as where the party said, "Stand off, I know you well enough; come at your peril;" or that there was some such notification thereof that the party might have known it, as by saying, "I arrest you." These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder. A private bailiff ought also to show the warrant upon which he acts, if it is demanded; and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to show at whose suit, and for what cause the arrest is made, out of what court the process issues, and when and where returnable.<sup>1</sup> In no case, however, is he required to part with the warrant out of his own possession, for that is his justification.<sup>2</sup>

It is clear, also, that the authority of an officer, in civil cases, must be regulated and limited by the writ or process which he is empowered to execute, and by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest or imprison, as no private person can of his own authority arrest in civil suits.<sup>3</sup> As will presently be seen more fully, where he proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess; and if he be killed, the offence will amount to no more than manslaughter in the person whose liberty is so invaded.<sup>4</sup> He should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it will be only manslaughter.<sup>5</sup> But if the process be executed within the jurisdiction of the court or magistrate from whence it issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office.<sup>6</sup>

<sup>1</sup> 1 Hale, 458, note (g); 6 Co. 54 a;  
9 Co. 69 a; infra, § 252.

<sup>2</sup> 1 East P. C. c. 5, s. 83, p. 319.

<sup>3</sup> 1 Hawk. P. C. c. 28, s. 19.

<sup>4</sup> Foat. 312.

<sup>5</sup> 1 Hale, 458; 1 East P. C. 314.  
See supra, § 228; infra, § 244.

<sup>6</sup> 1 Hale, 459.

3. *Officer acting out of jurisdiction.*

§ 236. As is stated by Sir William Russell,<sup>1</sup> the party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law; and therefore if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter.<sup>2</sup> And it has been ruled that homicide committed upon a bailiff, attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder.<sup>3</sup> It has been held that if the constable of the vill of A. come into the vill of B. to suppress some disorder, and in the tumult the constable be killed in the vill of B., this will be only manslaughter, because he had no authority in B. as constable.<sup>4</sup> But it was considered, that if the constable of the vill of A. had a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A., to suppress a riot in the vill of B., or to apprehend a person in the vill of B. for some misdemeanor within the jurisdiction and conuance of the justice of the peace, and in pursuance of that warrant he went to arrest the party in B., and in executing his warrant was killed in B., this amounted to murder. Under the former English practice, where a warrant was directed "to C. S., one of the collectors of the parish of W., the constables of the said parish, and all others his majesty's officers," to levy a distress, it was held that the constable of W. had no authority to execute it out of the parish of W.,—the rule of law being, that where a warrant is directed to officers as individuals, or to individuals who are not officers, they may execute it anywhere within the extent of the magistrate's jurisdiction; but where it is directed to men by the name of their office, it is confined to the districts in which they are officers. But the law in England as to the latter point was altered by the 5 Geo. 4, c. 18, reenacted by 11 & 12 Vict. c. 42, s. 10, which re-

<sup>1</sup> 1 Russ. on Cr. 582-592; 1 Hale, 457-9; 1 East P. C. c. 5, s. 80, p. 312, 314.

<sup>2</sup> 1 Russ. on Cr. 4th ed. 614.

<sup>3</sup> R. v. Mead et al. 2 Stark. 205.

<sup>4</sup> 1 Hale, 459.

cites that warrants addressed to constables, headboroughs, tithing-men, borsholders, or other peace officers of parishes, townships, hamlets, or places, in their characters of and as constables, headboroughs, tithing-men, borsholders, or other peace officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice; and then for remedy thereof enacts, "that it shall and may be lawful to and for each and every constable, and to and for each and every headborough, tithing-man, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, township, hamlet, or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithing-man, borsholder, or other peace officer specially, by his name or names, and notwithstanding the parish, township, hamlet, or place, in which such warrant or warrants shall be executed shall not be the parish, township, hamlet, or place for which he shall be constable, headborough, tithing-man, or borsholder, or other peace officer; provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or indorsed." This statute has been ruled not to extend to the warrant of a judge of the king's bench, but only to the warrants of persons having authority as justices of the peace within the limited jurisdictions therein expressed.<sup>1</sup> It may be observed, that if a warrant be directed to several persons, any of them may execute it.<sup>2</sup>

4. *Notice, what constitutes, and effect of want of it.*<sup>3</sup>

§ 237. Where a party is apprehended in the commission of an

<sup>1</sup> See 1 Russ. 615; Gladwell v. Blake, 5 Tyrw. 186; Freegard v. Barnes, 7 Exc. R. 827.

<sup>2</sup> 1 Hale, 452.

<sup>3</sup> See, as to proof of notice, *infra*, § 274.

offence, or upon fresh pursuit afterwards, notice is not necessary, because he must know the reason why he is apprehended. Thus, upon an indictment for maliciously wounding, it appeared that the assistant to the head keeper of Sir R. S. went with five or six assistants towards a covert of Sir R. S., where they heard guns; they then went towards the place, and rushed in at the poachers to take them; the prosecutor saw six persons in the wood, and he ran after them; they got into a field about six yards off; they then ranged themselves in a row, the prosecutor being five or six yards from them, on the edge of the plantation, and he heard one of them say, "The first man that comes out I'll be d—d if I don't shoot him," upon which the prosecutor drew his pistol, cocked it, and ran out; they all ran away together; the prosecutor followed them, and when they had run about fifty yards they stood; they all turned round; one of them shot at the prosecutor who was running to him; the prosecutor was wounded; the men said nothing to the prosecutor before he was shot, nor he to them; it was objected that, inasmuch as the prosecutor's authority to apprehend them was derived from the act creating the offence, it was incumbent upon him to give notice to them; the objection was overruled; and upon a case reserved, the judges were of opinion that the circumstances constituted sufficient notice.<sup>1</sup> So where a servant of Sir T. W. was out with his game-keeper at night, and they heard two guns fired, and went towards the place, and got into a covert, and saw some men there who ran away, and the servant pursued them, and got close up to one of them, and made a catch at his legs, and was immediately shot through the side; Parke, B., said: "Where parties find poachers in a wood, they need not give any intimation by words that they are game-keepers, or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose when he sees another at his heels?"<sup>2</sup>

§ 238. So in another indictment for the same offence, it appeared that two persons heard a noise in a board-house, near midnight, and saw the prisoner inside the board-house, and heard a noise among the boards, and heard the prisoner say, "Bring

<sup>1</sup> R. v. Payne, 1 M. C. C. R. 378. See R. v. Fraser, R. & M. C. C. R. 419.      <sup>2</sup> R. v. Davis, 7 C. & P. 785 — Parke, B. See R. v. Taylor, 7 C. & P. 266 — Vaughan, J.



that board ;" on which the persons went for the owner, who came in a quarter of an hour, when no one was found in the board-house ; but two planks had been removed to a part of the board-house nearer the door, and after searching in several places they found the prisoner in the garden of another person, crouched down under a tree, with a drawn sword in his hand, and being asked twice what he did there, he made no answer, and then started off, but was pursued and caught hold of by one of the persons, whom he compelled to leave his hold ; he then fell over something, and the others came up, and he then attempted to get away, but was prevented by some paling, and he then turned round and wounded the owner of the boards ; it was held, on a case reserved, that the circumstances of the case told him why he was apprehended, and that it was not necessary to tell him what he must have known.<sup>1</sup>

§ 239. If a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, in the daytime when it can be seen, it is conceived that this will be a sufficient notification of the intent with which he interposes ; and that, if resistance be made after this notification, and he or any of his assistants be killed, it will be murder in every one who joined in such resistance.<sup>2</sup> For it seems that in the case of a public bailiff, a bailiff *juratus et cognitus*, acting in his own district, his authority is considered as a matter of notoriety ; and upon this ground, though the warrant by which he was constituted bailiff be demanded, he need not show it ; and it is sufficient, if he notify that he is the constable, and arrest in the king's name.<sup>3</sup> And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted and killed in the attempt.<sup>4</sup> Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed to the constable of *Pattishal*, and delivered by the person who had obtained it to the deceased, to execute, as constable of the parish, and it appeared that the deceased went to the prisoner's house in the daytime to execute

<sup>1</sup> R. v. Howarth, 1 M. C. C. R. 207 ; 1 Russ. on Cr. 603. See R. v. Woolmer, 1 M. C. C. R. 334 ; 1 Russ. on Cr. 598.

<sup>2</sup> Fost. 311.

<sup>3</sup> 1 Hale, 583.

<sup>4</sup> 1 Hale P. C. c. 5, s. 81, p. 315.

the warrant, had his constable's staff with him, and gave notice of his business, and further that he had before acted as constable of the parish, and was generally known as such; it was determined that this was sufficient evidence and notification of the deceased being constable, although there were no proof of his appointment, or of his being sworn into the office.<sup>1</sup> So in the Sissinghurst House case,<sup>2</sup> it was resolved that there was sufficient notice that it was the constable before the man was killed: 1. Because he was constable of the same vill; 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant; 3. Because, after his retreat, and before the man was slain, he commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

§ 240. If a constable command the peace,<sup>3</sup> or show his staff of office,<sup>4</sup> this, it seems, is a sufficient intimation of his authority. In such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient.<sup>5</sup> Where he shows his warrant,<sup>6</sup> or where it appears that he is known to the defendant as an officer; as for instance, when the defendant said: "Stand off; I know you well enough; come at your peril,"<sup>7</sup> if, after this, the officer be killed, it will be murder. If the constable interfere to prevent an affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several know him to be a constable, it will be murder in him, manslaughter in the rest.<sup>8</sup> Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, in the impulse of the moment, wounded him with his sword and killed him, this was holden to be manslaughter.<sup>9</sup>

§ 241. *Ignorance as a defence.* — If the defendant, being placed in a position in which his life is imperilled, slay an officer of whose

<sup>1</sup> East P. C. c. 5, s. 81, p. 315.

<sup>2</sup> 1 Hale, 492, 493.

<sup>3</sup> 1 Hale, 461.

<sup>4</sup> Fost. 311.

<sup>5</sup> 1 East P. C. 315; Whart. C. L.

§ 615, 713.

<sup>6</sup> 1 Hale, 461.

<sup>7</sup> R. v. Pew, Cro. Car. 183.

<sup>8</sup> 1 Hale, 438.

<sup>9</sup> 1 Hale, 470.

official character he has no notice, this is homicide in self defence, if the killing was apparently necessary to save the defendant's life; nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having no notice of the fact.<sup>1</sup> Nor should it be supposed that this exemption from distinctive liability, in cases where the officer's official character is not known, is founded on technical reasoning. Not only is it essential to the rights of the citizen that he shall be required to submit to arrest only when the official character of the demand is made known to him, but it is essential to the dignity of the state that its servants should be sheltered by these official prerogatives only when they are acting legally, and give notice that they so act.<sup>2</sup>

It should, however, be remembered that if the defendant knows the person apprehending to be an officer, he cannot set up as a defence his erroneous belief that the proceedings are irregular.<sup>3</sup>

5. *By whom a warrant may be executed.*

§ 242. The English rule is that the warrant must be executed by the party named in it, or by some one assisting such party, either actually or constructively. Thus, under an indictment for maliciously cutting, it appeared that a warrant issued by commissioners of bankruptcy was directed to "J. Adams and W. Smith, our messengers, and their assistants;" and that the prosecutor, who was the assistant of Smith, having obtained the warrant from him, went in pursuit of the prisoner, who, on the prosecutor overtaking him, and saying he had the warrant, wounded the prosecutor with a stone, — neither Smith nor Adams being present at the time, nor anywhere near the place where the attempt to arrest occurred: it was objected that the prosecutor was not authorized by the warrant to arrest the prisoner except in the presence, actual or constructive, of either Adams or Smith, and that the word "assistants" only extended to persons who went with Adams and Smith to assist in taking the prisoner. Williams, J., said: "I think it is not sufficient that the prosecutor should have been deputed to act on the warrant by the messenger; and I think, also, that to authorize him to act, he must

<sup>1</sup> *Yates v. People*, 32 N. Y. 509; 2 *Cush.* 577; *Com. v. Cooley*, 6 *Gray*, *Logue v. Com.* 58 *Penn. St.* (2 350; and see particularly *Wh. Cr. Wright*) 265. See *People v. Mul-* *Law*, 7th ed. § 1288-1291.

*doon*, 2 *Parker C. R.* 18; *Johnson v.* <sup>2</sup> See *Wh. Cr. Law*, 7th ed. § 1288.

*State*, 26 *Tex.* 117; *Com. v. Kirby*, <sup>3</sup> *R. v. Bentley*, 4 *Cox C. C.* 406.

derive his authority direct from the commissioners themselves. It appears to me that the term "assistant" would apply to any person whom Adams or Smith directed to go in aid of them. It therefore remained uncertain who those assistants might be, till either Smith or Adams had named them; and I think that is not a legal execution of the warrant, unless it be executed in the presence, actual or constructive, of either Adams or Smith, who are named in it."<sup>1</sup> And so under another indictment for the same offence, it appeared that a constable having a warrant to apprehend the prisoner gave it to his son, who went in pursuit of the prisoner, in company with his brother; the father stayed behind. The brothers found the prisoner lying under a hedge, and when they came up he had a knife in his hand, running it into the ground; he got up from the ground to run away, one of them laid hold of him, and he stabbed him with the knife; the father was in sight at about a quarter of a mile off. Parke, B., said: "The arrest was illegal, as the father was too far off to be assisting in it."<sup>2</sup>

6. *How long a warrant continues in force.*

§ 243. Lord Kenyon has gone so far as to say that, as no time is fixed for the execution of a warrant, it continues in force till fully executed, though it be for seven years after its date, provided the magistrate continues alive.<sup>3</sup>

The prisoner was indicted for maliciously wounding the prosecutor with intent to resist his apprehension for a certain offence, to wit, for that he on, &c., at, &c., did violently assault and beat one W. P. The prosecutor having received a warrant, whereby he was commanded "to apprehend the prisoner and to bring him before me to answer unto the said complaint (assaulting W. P.), and to be further dealt with according to law," went in search of the prisoner, and brought him before the magistrate who granted the warrant, and another magistrate; he was ordered to find bail; he said he would not; upon which he was ordered to be committed; whilst the commitment was making out he made his escape; the prosecutor was ordered to go after him; there was no authority in writing; but in consequence of the verbal directions of the magistrates to the clerk, who was making out the

<sup>1</sup> R. v. Whalley, 7 C. & P. 245, 795.

<sup>2</sup> Dickenson v. Brown, Peake N.

<sup>3</sup> Rex v. Patience, 7 C. & P. 775. P. 344.

commitment, the latter ordered the prosecutor to go after the prisoner; the prosecutor accordingly did so, and in attempting to apprehend the prisoner was cut by him with a knife; it was objected on the part of the prisoner that the count was not proved, for that the party having been taken before the magistrate, the warrant was *functus officio*; and that the second taking was for having made his escape from the office; secondly, that the count was bad, as it did not follow that the offence stated, viz., assaulting W. P., was an offence for which the prisoner was liable to be apprehended; but Gaselee, J., thought the warrant continued in force, and that the second objection was upon the face of the record; and the jury having found the prisoner guilty, both objections were considered upon a case reserved, and the conviction was held good.<sup>1</sup>

7. *When process is illegal.*

§ 244. *Effect of illegal warrants.*—The English decisions, we are told by Mr. Roscoe,<sup>2</sup> “would appear to countenance the position that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter.” In Thompson’s case,<sup>3</sup> where the officer was about to make an arrest on an insufficient charge, the judge adverted to the fact, that the prisoner was in such a situation that he could not get away. In these cases it would seem to be the duty of the party, whose liberty is endangered, to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where,

<sup>1</sup> *Rex v. Williams*, R. & M. C. C. R. 387. This case goes on the ground that as no time is prescribed for the execution of a warrant, it continues in force till fully executed, though it be seven years after its date, provided

the magistrate so long lives. *Dickenson v. Brown*, Peake, N. P. 344 — Lord Kenyon, C. J.

<sup>2</sup> *Crim. Ev.* 707–8.

<sup>3</sup> 1 M. C. C. R. 80; *infra*, § 256.

as in Stockley's case,<sup>1</sup> and in Curtis's case,<sup>2</sup> the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such cases from the operation of the general rule, that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says: "It may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrong-doer."<sup>3</sup> It may be remarked that this question is fully decided in the Scotch law, the rule being as follows: In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained.<sup>4</sup> "If," says Baron Hume, "instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder."<sup>5</sup> "The distinction appears to be," says Mr. Alison, "that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error was not known to the party resisting; whereas, the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only."<sup>6</sup> In such cases, as is well stated, it may be deserving of consideration, whether the first inquiry ought not to be, whether or not the act done was caused by the illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest, as if it arose from previous ill will, it should seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have afforded any

<sup>1</sup> 1 East P. C. c. 5, s. 7, p. 310.

<sup>2</sup> Post. 135.

<sup>3</sup> 1 East P. C. 328. But see State v. Oliver, 2 Houst. 585.

<sup>4</sup> Alison's Princ. Cr. Law of Scotl. 25.

<sup>5</sup> 1 Hume, 250.

<sup>6</sup> See R. v. Thomas, 7 C. & P. 817.

provocation for it. Such a case would be like the cases where blows have been given by the deceased, but the fatal blow has been inflicted in consequence of previous ill will.<sup>1</sup> From the observations of Mr. B. Parke, in *Rex v. Patience*,<sup>2</sup> it appears that the very learned baron was of opinion that if there were previous malice, the illegal arrest would not reduce the crime to manslaughter; because the previous malice was the cause of the act, and not the illegality of the arrest. In such an inquiry, the fact that the prisoner was ignorant at the time that the arrest was illegal would be most material, because it would almost conclusively show that the act did not arise from that cause. It should also be observed, that if "one has a legal and illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has is his justification;"<sup>3</sup> so it might be contended that if the party apprehended had committed a felony, as he might be apprehended by any individual without a warrant, the apprehension by a constable under a defective warrant would not be illegal, as he might justify the arrest as a private individual.<sup>4</sup> So also as a constable has authority to apprehend any person within his district, whom he has reasonable ground to suspect of having committed a felony;<sup>5</sup> in such a case, also, it might be contended that he might justify the arrest, although in fact he did apprehend under an illegal warrant.

§ 245. *Arrest under wrong name.* — If a constable, having a warrant to apprehend A. B., arrest C. B. under the warrant, such arrest is illegal, although C. B. were the person against whom the magistrate intended to issue the warrant, and although the person who made the charge before the magistrate pointed out C. B. as the man against whom the warrant was issued. A magistrate for the county of Herts. issued his warrant, directing a constable to take John H. charged with stealing a mare. Armed with this warrant, the constable went to Smithfield, and there arrested Richard H., who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant,

<sup>1</sup> 7 C. & P. 775; *supra*, § 242.

tom, 1 T. R. 654; *The Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264.

<sup>2</sup> *Alison's Princ. Cr. Law of Scotland*, 28.

<sup>3</sup> Per Tindal, C. J., in *Hoye v.*

<sup>4</sup> Per Holt. C. J. *Greenville v. The College of Physicians*, 12 Mod.

*Bush*, 1 M. & Gr. 775.

386; and see *Crawford v. Ramsbot-*

<sup>5</sup> *Beckwith v. Philby*, 6 B. & C. 638.

and who was supposed to be called John H. ; his name, however, was really Richard H., John H. being the name of his father. There was no proof that a felony had been committed. The person who made the charge before the magistrate pointed out Richard H. as the man who had stolen the mare, and a person present said that his name was John H., and there was clearly evidence to go to the jury that Richard H. was the man intended to be taken up. Coltman, J., told the jury that the law would not justify the constable's act, the warrant being against John and not against Richard, although Richard was the party intended to be taken ; that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name ; that a constable may, in many cases, take up a person on a charge of felony, by virtue of his office of constable, and without any warrant from a magistrate, but that he can only do so within the district for which he is chosen constable. The jury having found a verdict against the constable, the court held that the direction was right, declaring that in civil process the taking a person by the name mentioned in a warrant, his real name being different, cannot be justified, and that no distinction could be made between civil and criminal process, as in either case the object of the warrant is to identify the party intended to be arrested.<sup>1</sup>

So far indeed has the doctrine of the necessity of legal completeness and precision in the warrant been carried, that a warrant, leaving a blank for the Christian name of the person to be apprehended, and giving no reason for the omission, but describing him only as — H., the son of S. H., and stating the charge to be for assaulting A. B. in the execution of his duty, without particularizing the time, place, or any other circumstances of the assault, has been held too general and unspecific, and it was, therefore, ruled that a resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder. Thus, upon an indictment for maliciously wounding, it appeared that George Hood having assaulted Brown, a sheriff's officer, who was endeavoring to arrest his father, Samuel Hood, under a *capias ad respondendum*, Brown applied to a magistrate for a warrant to

<sup>1</sup> *Hoye v. Bush*, 1 M. & Gr. 775 ; ant's name as John Doe or Richard Roe, whose other name is to complainant unknown, is held void. so also *Com. v. Crotty*, 10 Allen, 403, where a warrant specifying the defend-



apprehend George Hood for an assault, but not being at that time acquainted with his Christian name, the warrant, so far as it related to the name and description of the person committing the assault, was in the following terms, viz., "to take the body of — Hood (leaving a blank for the Christian name), of, &c., by whatsoever name he may be called or known, the son of Samuel Hood, to answer, &c., on the oath of Francis Brown, an officer of the sheriff of the county of Wilts, for assaulting him in the execution of his duty." This warrant was delivered to the tithing-man to execute, and he went to S. Hood's house, with Brown and others to execute it; and Brown pointed out G. Hood to the tithing-man as the person on whom the warrant was to be executed, and upon attempting to apprehend him, he stabbed a person whom the tithing-man had charged to aid and assist. S. Hood had four sons who resided with him. It was objected that as the Christian name of George Hood was omitted, the warrant was illegal, and would not authorize his apprehension; and upon a case reserved, the judges were unanimously of opinion that the warrant was bad, because it omitted the Christian name; it should have assigned some reason for the omission, and have given some particulars of George Hood, by which he might be distinguished from his brothers.<sup>1</sup>

It should be observed, however, that in this case, in addition to the omission of the Christian name, the warrant was defective in not showing that the offence was committed within the jurisdiction of the magistrate by whom it was granted.

§ 246. *No statement of offence.* — So a warrant omitting to state an offence is illegal.<sup>2</sup>

§ 247. *Falsity of charge no alleviation.* — As has already been noticed, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer, for every man is bound to submit himself to the regular course of justice,<sup>3</sup> and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it.<sup>4</sup>

<sup>1</sup> *R. v. Hood*, 1 M. C. C. R. 281.

<sup>3</sup> 1 East P. C. c. 5, s. 8, p. 310.

<sup>2</sup> *Money v. Leach*, 1 W. Bl. 555;

<sup>4</sup> *Curt's case*, Fost. 135; and see Fost. 312.

*Nisbett, ex parte*, 8 Jurist, 1071. *Ca-*  
*vale v. Seymour*, 1 Q. B. 889.

§ 248. *Warrant without seal void.* — If a warrant commanding the arrest of an individual in the name of the state have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong-doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter and not murder.<sup>1</sup>

§ 249. *Blank warrant illegal.* — The question of the illegality of blank warrants — a species of process formerly common in England, and at present to be frequently met with in this country — has been settled in England by a series of decisions which admit of no dispute. Thus, as early as 1753, the prisoner, Stockley, about Lady-day, 1753, had been arrested by Welch, the deceased, at the suit of one Bourn, but was rescued; and he afterwards declared that if Welch offered to arrest him again he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle (who acted for the under-sheriff of Staffordshire), to have warrants made out upon such writ. The custom of the under-sheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper, and delivered it to Welch, who inserted therein the names of Thomas Clewes and William Davil, on the 12th of July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into Stockley's house first, and called for refreshment; but, an alarm being given that Welch was coming, the door was locked, upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this Welch and Howard endeavored to get into the house, and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley then absconded, and was not apprehended till December, 1771. At the Lent Assizes following, he was tried for murder, when the jury expressly found that the deceased attempted to get into the house to assist in the arrest of

<sup>1</sup> Tuckett v. The State, 3 Yerger, 392.

Stockley. Howard, Clewes, and Davil being dead, their depositions before the coroner were read, and minutes were taken of the above facts for a special verdict ; but, to save expense, the case was referred to the judges of the king's bench, who certified that the offence amounted in point of law only to manslaughter.<sup>1</sup> The same point has been frequently ruled since,<sup>2</sup> and it has ever been held that the arrest was illegal where the warrant was filled up after it had been sealed.<sup>3</sup> But if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems that the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. Banks and Powell had a warrant from the sheriff of Salop, upon a writ of possession against the prisoner's house ; and their names were interlined after the warrant was sealed, but before it was sent out of the office. The prisoner refused them admittance, and, on their bursting open the door, shot at Banks, and wounded him severely. Upon an indictment for wilfully shooting, upon the 43 Geo. 3, c. 58, objection was taken that the warrant gave Banks and Powell no authority, because their names were inserted after it was sealed. But the prisoner having been convicted, and the point reserved for the consideration of the judges, all who were present (viz., eleven) held that the conviction was right.<sup>4</sup> But where a magistrate who kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavoring to arrest the party, was killed ; it was held that this was murder in the person killing the officer, and he was accordingly executed.<sup>5</sup>

§ 250. *Informality not amounting to illegality.*—Where, however, a warrant is merely informal, but not illegal, its informality will be no palliation for the killing of the officer intrusted with its execution.<sup>6</sup>

<sup>1</sup> Stockley's case, 1 East P. C. c. 5, s. 58, p. 310.

<sup>2</sup> See *Housin v. Barrow*, 6 T. R. 122, and cases there cited.

<sup>3</sup> *Stevenson's case*, 19 St. Tr. 846.

<sup>4</sup> *R. v. Harris*, 1 Russ. on Cr. 621.

<sup>5</sup> 1 East P. C. c. 5, s. 78, p. 311.

<sup>6</sup> *R. v. Allen*, 17 L. T. N. S. 222 ; *Sandford v. Nichols*, 13 Mass. 210 ; *Boyd v. State*, 17 Ga. 194 ; *Com. v.*

*Martin*, 98 Mass. 4 ; *R. v. Ford*, R. & R. 329. Under English statute, see *R. v. Roberts*, 4 Cox C. C. 145. Omission to state in assault that an assault had been committed is fatal. *Caudle v. Seymour*, 1 Q. B. 889. See as to other informalities, *Jones v. Johnson*, 5 Exch. 862 ; *S. C.* 7 Exch. 452 ; *R. v. Downey*, 7 Q. B. 281 ; *State v. Oliver*, 2 Houst. 585.

§ 251. *Belief that proceedings are illegal no defence when they are legal, if the person apprehending be an officer.* — This point has been already noticed.<sup>1</sup>

§ 252. *Warrant need not be shown.* — It is not necessary that a warrant be shown to the party to be arrested, provided its substance be mentioned.<sup>2</sup> Indeed, as is elsewhere stated,<sup>3</sup> if reading the warrant to the defendant is a prerequisite to an arrest, the defendant might never be arrested, for he might decline to wait to hear the warrant read.<sup>4</sup>

8. *Where the arrest is made without any warrant.*

§ 253. As will be more fully seen hereafter,<sup>5</sup> not only officers of justice, but private persons are empowered to make arrests in cases where felonies can in no other way be prevented. Independently of this principle, which is not now under discussion, an officer, though without a warrant, has a right to arrest on charge of felony ; and if the fact of his being an officer be known to the party attempted to be arrested, killing by the latter of the former will be murder, though no felony was in fact committed.<sup>6</sup> Thus, upon an indictment for charge of maliciously wounding under the 9 Geo. 4, c. 81, it appeared that the prisoners had attempted to push a man into a ditch, upon which a scuffle ensued. The prisoners walked on, and the man complained to Harrison, a watchman, that they had attempted to rob him, desired him to arrest them, followed them till Harrison came up to them, and then said, sufficiently loud for them to hear, "That's them." There was no evidence of any attempt by the prisoners to rob the man, and the only person who saw the transaction negatived it. When Harrison came up to the prisoners, all he said to them was, "You must go back and come along with me." He did not explain the reason why, nor was any charge against the prisoner stated. He was dressed in a watchman's coat, and had his lantern. W., one of the prisoners,

<sup>1</sup> See *supra*, § 221, and also *R. v. Drennan v. People*, 10 Mich. 169 ; *Bentley*, 4 Cox C. C. 406.

<sup>2</sup> 2 Hawk. P. C. c. 13, § 28 ; though see *State v. Garrett*, 1 Wins. N. C. 144 ; *Gen. Stat. Mass. ch. 158, § 1.* *Wolf v. State*, 19 Oh. St. 248. See, however, under English statute, *R. v. Davis*, 1 L. & C. 64.

<sup>3</sup> Wh. Crim. Law, § 2926.

<sup>4</sup> *Infra*, § 269.

<sup>5</sup> See *R. v. Allen*, 17 Law T. N. S. 222 ; *Com. v. Cooley*, 6 Gray, 350 ; *Arnold v. Steeves*, 10 Wend. 514 ; *R. v. Woolmer*, 1 Mood. C. C. 334 ; *Boyd v. State*, 17 Ga. 194.

said, "Keep off," and drew a sharp instrument from his side; the watchman said, "It's of no use, you must go back." A third man put himself in a position as if to strike the watchman, and W. made a spring at him, and caught one of the skirts of his coat; the watchman pulled out his staff, and turned at the prisoners, and they came at him. The watchman struck at W., and hit him on the thick part of the arm with his staff; W. immediately stabbed the watchman, and another of the prisoners followed the watchman, and made another blow at him with another knife. The place where the prisoners attempted to push the man into the ditch was within the limits of the hamlet for which Harrison was watchman, but the place where he overtook the prisoners did not appear to be within those limits. The jury found that the prisoners knew Harrison to be a watchman. Mr. Baron Bayley doubted whether, as no felony had been committed, and there had been no breach of the peace in Harrison's presence, he could legally arrest, at least without first stating to the prisoners why he purposed to arrest, and he also doubted his power out of the limits of his hamlet; and he reserved the case for the opinion of the judges, nine of whom held that the watchman could legally arrest the prisoners without saying that he had a charge of robbery against them, though the prisoners had in fact done nothing to warrant the arrest; and that had death ensued, it would have been murder. Four of the judges<sup>1</sup> were of a contrary opinion.<sup>2</sup>

§ 254. *Statutory power to arrest persons when in commission of offence.* — A class of statutes exist both in England and in this country which give authority not only to constables but also to private persons to apprehend persons *found committing* certain offences specified in such statutes. In these cases it is requisite that the authority to apprehend should be strictly pursued, and the party supposed to be guilty must be apprehended either committing the offence, or upon immediate and fresh pursuit.<sup>3</sup>

§ 255. *Officer's power to arrest during offence.* — Indepen-

<sup>1</sup> Bayley, B., Park, J., Littledale. *Hanway v. Boulton*, 1 Moo. & Rob. J., and Bosanquet, J. 14; *R. v. Fraser*, R. & M. C. C. R.

<sup>2</sup> *R. v. Woolmer*, 1 M. C. C. R. 419; *R. v. Phelps*, C. & M. 180; 1 334. *Russ. on Cr.* 605.

<sup>3</sup> *R. v. Curran*, 3 C. & P. 397;

dently of this statute, it is held that an officer can arrest for all offences committed in his presence;<sup>1</sup> though it is said in New York that this right is limited to felonies and breaches of the peace.<sup>2</sup>

*For past offences right limited to felonies and breaches of the peace.* — But however it may be with offences committed in the presence of the officer, it is clear that the officer's right to arrest without warrant is limited to felonies which the defendant is reasonably suspected to have committed, and to breaches of the peace of which a renewal may be expected.<sup>3</sup> But where a serious assault is threatened, and there is a probability of its execution, then the officer may arrest without warrant.<sup>4</sup>

§ 256. *Killing of officer arresting on reasonable suspicion is murder.* — Where there is a reasonable suspicion that a felony has been committed, and a charge has been made against a particular defendant connecting him with it, killing the officer who arrests the defendant will be murder, though he has no warrant, and though the charge does not in terms express all the particulars necessary to constitute the felony.<sup>5</sup> Thus, where the prisoner had produced a forged bank note, and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and taken to a constable, and delivered with the note to the constable; and the charge to the constable was, "because he had a forged note in his possession." After he had been in custody at the constable's some hours, namely, from six o'clock in the evening until eleven, the constable was handcuffing him to another man, when he pulled out a pistol and shot the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. 3, c. 58; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing

<sup>1</sup> Supra, § 193-195. *Derecourt v. Corbishley*, 5 E. & B. 188; *R. v. Mabel*, 9 C. & P. 494; *Com. v. Deacon*, 7 S. & R. 47; *State v. Brown*, 5 Harring. 505. See *R. v. Light*, 7 Cox C. C. 389; *D. & B. 332*.

<sup>2</sup> *Butolph v. Blust*, 5 Lansing, 84; *Boylston v. Kerr*, 2 Daly, 220.

<sup>3</sup> *Whart. Cr. Law*, 7th ed. § 2927;

*Galliard v. Laxton*, 2 B. & S. 363; *R. v. Walker, Dears. C. C. 358*; *Roscoe's Cr. Ev.* (ed. of 1874) declares this the "better opinion." See to same effect *R. v. Marsden*, L. R. 1 C. C. R. 131; *R. v. Chapman*, 12 Cox C. C. 4.

<sup>4</sup> *R. v. Light*, D. & B. C. C. 332; *Baynes v. Brewster*, 11 L. J. M. C. 5

<sup>5</sup> See supra, § 246.

the officer (if that had taken place) would have been only manslaughter. But the prisoner having been convicted, and the case reserved for the consideration of the judges, they were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been considered as imputing to the prisoner a guilty possession.<sup>1</sup> In a case, however, which has been already stated, where an arrest by a constable would have been clearly illegal, an attempt to make it under the circumstances was held to be such a provocation as would have reduced the case to manslaughter if death had ensued. The indictment was for stabbing and cutting with intent to murder upon the 43 Geo. 3, c. 58. On the trial it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work; that he applied again subsequently, was again refused, and became abusive, upon which his master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up-stairs and pack up his tools, and that no constable should stop him. He went up-stairs, came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first bloody constable that offered to stop him; that he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to a constable to take the prisoner into custody; making no charge further than saying that he suspected the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if the master would give him charge of him; and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there; the privy had no door to it. The master said, "That is the man, and I give you charge of him;" upon which the constable said to the prisoner, "My good fellow, your master gives me charge of you; you must go with me." The prisoner, without saying anything, presented the knife, and stabbed the constable under the left breast; and attempted to make several other blows which

<sup>1</sup> R. v. Ford, RIBB. & Ry. 329.

§ 259.] HOMICIDE OF OFFICERS OF JUSTICE, ETC.: [CHAP. VIII.

the constable parried off with his staff. The constable then aimed a blow at the prisoner's head, upon which he ran away with the knife. The knife had struck against one of the constable's ribs and glanced off; if it had struck two inches lower death would have ensued; but the wound as it happened was not considered dangerous. The prisoner having been found guilty, upon a case reserved, the majority of the judges present, namely, Abbott, C. J., Graham B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J., held that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only; and that therefore the conviction was wrong. Holroyd, J., and Burrough, J., thought otherwise.<sup>1</sup>

§ 257. *What is reasonable suspicion.*—Whatever would amount to probable cause in an action for malicious prosecution is reasonable suspicion to justify an arrest.<sup>2</sup>

2d. *Ship's Officers.*

§ 258. *Military and naval officers governed by the same rules.*—Military and naval officers, when acting without authority, are to be treated as private citizens, and are responsible as such.<sup>3</sup> Hence, where an officer of a British ship of war, in the year 1769, attempted without a special warrant to impress several seamen in a Massachusetts merchant vessel, and was killed in the attempt, it was held but manslaughter, the deceased acting without authority.<sup>4</sup>

3d. *Private Persons.*

§ 259. *Persons aiding officers entitled to protection as officers.*—As has already been generally observed, every one coming to the aid of the officers of justice, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer

<sup>1</sup> R. v. Thompson, 1 Mood. C. C. R. v. Dadson, T. & M. 389; 2 Den. C. 80. Best, C. J., and Alexander, C. C. 35.

B., were absent. Supra, § 232, 246.

<sup>3</sup> Supra, § 219.

<sup>2</sup> See Wh. Cr. Law, 7th ed. § 2928;

<sup>4</sup> Case of the crew of the Pitt packet, 4 Boston Law Reporter, 369.



himself.<sup>1</sup> A person aiding a policeman in conveying a person suspected of felony to the station-house is entitled to the same protection *eundo, morando, et redeundo* as the policeman. The deceased having been required by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death, and it was objected that he was not at the time aiding the policeman; Coltman, J., said, "He is entitled to protection *eundo, morando, et redeundo*."<sup>2</sup>

§ 260. *So as to private persons lawfully arresting independently of officer.* — The same sanction is, with certain restrictions to be hereinafter stated, extended to the cases of private persons interposing for preventing mischief from an affray, or using their endeavors to apprehend felons, or those who have given a dangerous wound, and to bring them to justice; such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice.<sup>3</sup> And it is murder for the defendant, he being pursued for felony, of which probable cause is shown, to kill one of the pursuers, he knowing them to be such.<sup>4</sup>

§ 261. *Caution to be observed by pursuers.* — While it is clear that a private person is not only justified but obliged to do his best to bring felons to justice, as well as to prevent felony,<sup>5</sup> a party interfering on this principle should be clear, first, that a felony has actually been committed, or that an actual attempt

<sup>1</sup> 1 Hale, 462, 463; Fost. 309; Brooks v. Com. 61 Pa. St. 352; Galvin v. Com. 6 Cold. (Tenn.) 283. In such case the private persons so assisting are under the officer's commands. R. v. Patience, 7 C. & P. 775; People v. Moore, 2 Douglass (Mich.) 1. And the officer may have special private assistants. Coyles v. Hurten, 10 Johns. 85.

<sup>2</sup> R. v. Phelps, 1 C. & M. 480; R. v. Porter, 12 Cox C. C. 444; State v. Oliver, 2 Houst. 585.

<sup>3</sup> Fost. 309; Jackson's case, 1 East P. C. 298; Brooks v. Com. 61 Penn. St. 352. See, however, supra, § 218; and see § 198, 259.

<sup>4</sup> Ibid. See Galvin v. State, 6 Cold. (Tenn.) 283; Reuck v. McGregor, 3 Vroom (N. J.), 70; Holly v. Mix, 3 Wend. 350; Com. v. Deacon, 8 S. & R. 48; State v. Roane, 2 Dev. 58.

<sup>5</sup> Ex parte Kraus, 1 B. & C. 261; 1 Russ. on Cr. 535. See more fully, Com. v. Daily, Com. v. Hare. Appendix; Dill v. State, 25 Ala. 15.

to commit a felony is being made by the party arrested;<sup>1</sup> and, second, that it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter: the one not having used due diligence to be apprised of the truth of the fact; the other not having submitted and rendered himself to justice.<sup>2</sup>

§ 262. *Private persons may interfere to prevent felony.*— Thus, where H., being called up in the night by one of his servants, found that his stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found, by which the door of the stable appeared to have been cut, and some house-breaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by H. and his servant, and during such detention, and in the course of the same night, the prisoner had cut H.'s servant with a knife, a point was made that such cutting was not within the 43 Geo. 3, c. 58, on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the judges held that the prisoner being detected in the night attempting to commit a felony might be lawfully detained without a warrant, until he could be carried before a magistrate.<sup>3</sup>

Upon an indictment for wounding, it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ash-pit, which he was permitted to do; as he was carrying

<sup>1</sup> 2 Inst. 52, 172; Fost. 318; Samuel N. Y. 463; Hawley v. Butler, 54 Barb. v. Payne, Dougl. 359; and in Cox v. 490. See supra, § 218.

Winan, Cro. Jac. 150, it was holden, <sup>2</sup> 1 Hale, 490; Fost. 318. See State v. Rutherford, 1 Hawks N. C. Rep. 457.

Hen. 7, 5; 7 Hen. 4, 35, are cited. <sup>3</sup> R. v. Hunt, Ry. & Mood. Cr. C. To same effect see Burns v. Erben, 40 93.

away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle, which had stood on a shelf near the ash-pit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife; a rattle of copper had been heard while the prisoner was at the ash-pit; it was objected that the prosecutor had no right to detain the prisoner. Alderson, B.: "That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony."<sup>1</sup>

§ 263. *Indictment found, good cause of arrest by private persons.* — An indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon; but it is said, that if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out; otherwise, they will be guilty of manslaughter.<sup>2</sup>

#### 4th. *Railway Officers.*

§ 264. A railway officer has a right to put out of the cars, in a careful way, so as not unnecessarily to hurt, a person who is disorderly in the cars, or who refuses to obey the rules of the company.<sup>3</sup> But if the railway officer exact conditions which are unjust or illegal, then he is liable for any injury he or his assistants may inflict. And so if his mode of arrest or detention be unnecessarily severe.<sup>4</sup> The same principles govern the rights of the assailed party in resisting the assault.

<sup>1</sup> R. v. Price, 8 C. & P. 282 — Alderson, B.

<sup>2</sup> Dalt. c. 170, s. 5; 1 East P. C. c. 5, s. 68, p. 301.

"There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been com-

mitted; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." Beckworth v. Philby, 6 B. & C. 638.

<sup>3</sup> See Wharton on Negligence, § 646, and cases there cited.

<sup>4</sup> R. v. Mann, 6 Cox C. C. 461.

## II. IN WHAT CASES.

### 1st. *Felonies.*

§ 265. *In felonies arrests may be made in prevention.* — The rule of law bearing on this point has already been stated in the pages immediately preceding.<sup>1</sup> It is sufficient now to recapitulate what has been there said, that a more liberal construction of the right to arrest exists in felonies than in misdemeanors. If a felony be committed and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors to prevent an escape; and in such cases, if fresh pursuit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit will be under the same protection of the law; and the same rule holds if a felon, after arrest, break away as he is being carried to jail, and his pursuers cannot retake him without killing him.<sup>2</sup> Thus, where, upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder.<sup>3</sup>

§ 266. *And so after commission on reasonable suspicion.* — A peace officer may justify an arrest on a charge of felony, on reasonable cause of suspicion, without a warrant, although it should afterwards appear that no felony had been committed.<sup>4</sup> And where a private person, suspecting another of felony, has laid his grounds of suspicion before a constable, and required his assistance to take him, the constable may justify killing the party, if he fly, and cannot otherwise be taken, though in truth he were innocent. But in such case, where no hue and cry is levied, the party suspecting ought to be present, as the justification must be

<sup>1</sup> See *supra*, § 227-9.

<sup>2</sup> Jackson's case, 1 Hale, 464.

<sup>3</sup> 1 Hale, 489, 490; 1 Hawk. P. C. <sup>4</sup> Samuel v. Payne, Dougl. 359. See c. 28, s. 11; Fost. 309; 1 East P. C. *supra*, § 256-7.

c. 5, s. 67, p. 298.

that the constable did aid him in taking the party suspected; and the constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it.<sup>1</sup> A police officer found N. with potatoes under his shirt, which had been very recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so, and a rescue being attempted, O. was going away, and was struck by A., who went away, and O. was afterwards killed by other persons who attempted the rescue; it was held that the police officer had no right to apprehend N., and that the killing of O., therefore, did not amount to murder.<sup>2</sup>

### 2d. Misdemeanors.

§ 267. *After commission, private persons cannot arrest.* — No matter what may be the case of misdemeanor, there is no power in a private person to apprehend after the offence has been committed. Thus, to trespass for false imprisonment the defendant pleaded that an evil disposed person, to him unknown, had obtained goods from him by false pretences; that the plaintiff afterwards passed by the defendant's shop, and was pointed out to him by his servant as the person who had so obtained the goods; whereupon the defendant, vehemently suspecting that the plaintiff was the person who had committed the offence, gave charge of him to a police officer to be taken before a magistrate, and upon this plea the defendant had a verdict. It was contended, in showing cause against a rule for judgment *non obstante veredicto*, that offences partaking of the nature of a felony, as a fraud, which borders upon a theft, might come under a different rule from misdemeanors, which merely constituted a breach of the peace. But Lord Tenterden, C. J., said: "The distinction between felony and misdemeanor is well known and recognized, but is there any authority for distinguishing between one kind of misdemeanor and another?" It was admitted that there was no direct authority, but 2 Hawk. P. C. c. 12, s. 20, and 2 Hale, 88, 89, were relied upon. Lord Tenterden, C. J.: "The instances in Hawkins are where the party is caught in the fact, and the observation there added assumes that the party was guilty. Here

<sup>1</sup> Supra, § 256-7; 2 Hale, 79, 80,    <sup>2</sup> R. v. Phelps, 1 Carr. & Marsh. 91-3; 3 Inst. 221; 1 East P. C. c. 5, 180.  
s. 69, p. 301.

the case is only of suspicion. The instances in Hale, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor it is much better that the parties should apply to a justice of peace for a warrant than take the law into their own hands, which they are too apt to do. The rule must be made absolute."<sup>1</sup>

§ 268. *But otherwise in sudden affrays.* — Where private persons interpose, in the case of sudden affrays, to part the combatants and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray who shall kill the party so interposing; but it will not be murder in the other affrayer, unless he also strike the party.<sup>2</sup>

§ 269. *Arrest without warrant extenuates offence.* — The same doctrine applies to officers arresting parties without warrant, on a charge of misdemeanor reported to have been committed. Thus, if a constable take a man without warrant, upon a charge of ill-using a person, which ill-usage was not in the presence of the constable, and, therefore, gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because the arrest is illegal, and J. S. ought to have known it was, and then his attempt to retake was illegal also; and that though the prisoner, while in custody of the constable, struck the man by whom the charge was given; because a blow whilst he was under the influence of the provocation from the illegal arrest caused by such man would not justify the constable in detaining him: at least it will make no difference if the blow was not likely to be followed with dangerous consequences, nor made a new and distinct ground of detainer. Upon an indictment for maliciously cutting Walby, it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so misusing him; on which the constable, meeting the prisoner passing along the highway, ordered him to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a mag-

<sup>1</sup> Fox v. Gaunt, 3 B. & Ad. 798;    <sup>2</sup> Fost. 272; infra, § 273, 378.  
supra, § 260.

istrate, and ordered Walby to assist him, which W. did, and to which the prisoner submitted, No particulars of what the supposed ill usage or insult consisted of appeared in evidence, *nor did they pass in the constable's view or hearing*, and, therefore, the apprehension and detainer appeared clearly thus far to have been unlawful. Afterwards, and whilst the prisoner was thus in custody, and before they found a magistrate, the prisoner struck the man, in the constable's presence, who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate; and some time afterwards, as they were proceeding along to a magistrate's, the prisoner ran away and attempted to escape, but was pursued by W. by the constable's order, and being overtaken by him, refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick which W. then had in his hand, and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let go he would stab him, and then gave him the cut in the face for which he was thus indicted. Holroyd, J., doubted whether the effect of the first illegal custody might not operate upon the circumstances that subsequently took place, as a defence against the present indictment, either in rendering even the subsequent imprisonment tortious, or depriving the prisoner's conduct of the necessary legal ingredient of malice; and he reserved the case for the opinion of the judges, who held that the original arrest was illegal, and that the recaption would have been illegal, and, therefore, the case would not have been murder if death had ensued.<sup>1</sup>

§ 270. *No power in justice of the peace to detain without charge.* — Even a justice of the peace has no authority to detain a person known to him, till some other person makes a charge against him: before he detains a person known, he ought to have a charge actually made. Upon an indictment for false imprisonment and assaulting one Smyth, it appeared that Smyth went to a police office, where two magistrates were sitting, to make a complaint, which was dismissed, and he was retiring, when one of the magistrates said: "Stop him; shut the door; don't let that man escape. Where is the person that has got the information

<sup>1</sup> R. v. Curran, R. & M. C. C. R. 132; supra, § 253.

to lay against him for tampering with the due course of justice?" On which he was detained. For the defendants it was opened, that the magistrates were informed that an officer had a complaint to make against Smyth for having tampered with the due course of justice; and that the officer not being then at the office, Smyth was detained till he was sent for; and it was contended that, if a magistrate has a person before him charged with either felony or misdemeanor, he may either go into the case immediately, or detain the party to await his pleasure. Lord Tenterden, C. J., said: "I am of opinion that the justices could not detain a person known to them, till some other person should make a charge; I think before they detain a known person, they should have a charge actually made."<sup>1</sup>

Where, however, life is threatened, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace.<sup>2</sup>

§ 271. *Arrest for breach of peace illegal without corpus delicti.*<sup>3</sup> — Upon an indictment for maliciously stabbing with intent to murder, it appeared that the prisoner, about half-past ten at night, went to a house and demanded to see the servant girl. He was desired to quit the house, which he refused to do, and the prosecutor, who was a constable, was sent for. Before the prosecutor came the prisoner left the house and went into the garden. In about twenty minutes the prosecutor came. The prisoner did nothing in his presence; but upon the prisoner saying, "If a light appear at the windows, I will break every one of them," the prosecutor took him into custody, and he afterwards cut the prosecutor with a knife; it was submitted that the arresting the prisoner was illegal, as nothing had been done by him in breach of the peace in the presence of the constable. Parke, J.: "I think that the detention of the prisoner by the prosecutor was illegal. There was no breach of the peace when the prisoner was taken into custody."<sup>4</sup>

<sup>1</sup> R. v. Birnie, 5 C. & P. 200.

<sup>2</sup> Hale, 88. This power seems to be grounded on the duty of the officer to prevent a probable felony, and must be governed by the same rules which apply to that case; though Dalton (c.

116, s. 3) extends it even to the prevention of a battery. Vide 1 East P. C. c. 5, s. 72, p. 306.

<sup>3</sup> See supra, § 255.

<sup>4</sup> R. v. Bright, 4 C. & P. 387.



## 3d. Riots.

§ 272. — *Officers to be protected in efforts to quell riots.* — This topic has been already generally discussed.<sup>1</sup> Among the leading English cases may be cited the following:—

A great number of persons, assembled in a house called *Sissinghurst*, in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz., A., was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend the said A., and divers other persons unknown, who were all together in *Sissinghurst House*. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded A. with the rest of the offenders that were then in the house; and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors; but, going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away, and being about five rods from the door, B., C., D., E., F., &c., about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G. that read the warrant were two. For this A., B., C., D., E., F., G., and divers others, were indicted of murder, and tried at the king's bench bar, when these points were unanimously determined:—

1. That although the indictment averred that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in *Mackally's case*.<sup>2</sup>

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they

<sup>1</sup> See *supra*, § 200–7.

<sup>2</sup> 9 Co. 67 b.

did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rods of the house, and in view thereof, and all done as it were in the same instant.

4. That here was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the same vill. 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. 3. Because, after his retreat, and before the man was slain, the constable commanded the peace; and, notwithstanding, the rioters fell on and killed the party.

5. It was resolved that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A., yet the killing of the assistant of the constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary, when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring; but this point was not relied upon, because there was enough upon the former point to convict the offenders. In the conclusion, the jury found nine of them guilty, and acquitted those within; not because they were abused, but because there was no clear evidence that they consented to the assault as the

jury thought; and therefore judgment was given against the nine to be hanged.

§ 273. *May arrest during affray.* — While it is well settled, as has been stated, that a constable or other peace officer has no right to arrest *after an affray* without a warrant, yet it is clear that he, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take part in the resistance, — there being either implied or express notification of the character in which he interposed.<sup>1</sup>

§ 274. *Notice may be inferentially shown.* — What degree of notice is required to acquaint parties with the fact of office has been already partially considered.<sup>2</sup> In such cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially if it be in the daytime.<sup>3</sup> In the night some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient.

§ 275. *If affray be over, power ceases.* — It becomes, under the law as just stated, an important inquiry whether an affray be actually over, for on this depends the question how far an arrest made without warrant is legal.<sup>4</sup> Thus, upon the trial of an action for an assault, it appeared that about midnight there was a disturbance, and ringing and knocking at many doors; that the disturbance continued about three hours, and about three o'clock in the morning the high constable asked the plaintiff to assist him in taking the parties into custody, and that the plaintiff went into the street, and that one White desired the defendant to go home, and the defendant replied, "If you do not leave me alone I will knock your brains out, or give you a good ducking," whereupon the plaintiff and White laid hold of the defendant to convey him to the cage; and when near the cage

<sup>1</sup> 1 Hale, 463; 1 Hawk. P. C. c. 31, s. 54; Fost. 310.

<sup>2</sup> Supra, § 237.

<sup>3</sup> 1 Hale, 361; Fost. 311.

<sup>4</sup> See supra, § 271.

door, all three fell down; and it was imputed that at this time the defendant kicked the plaintiff on the leg, which was the injury for which the action was brought. Alderson, B., said to the jury: "The questions for your consideration in this case are, whether the defendant was engaged in the affray; whether the constable had view of the affray while he was so engaged in it; and whether the affray was continuing at the time that he ordered the plaintiff to apprehend the defendant. If you are satisfied that all these points are made out, then, if the defendant assaulted the plaintiff while the plaintiff was endeavoring to apprehend him, such assault is unjustifiable, and the verdict ought to be for the plaintiff. If, however, there had been an affray, and that affray were over, then the constable had not, and ought not, to have the power of apprehending the persons engaged in it: for the power is given by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate. You must, therefore, before you find for the plaintiff, be satisfied that the defendant was a party to the affray, and that the affray was continuing at the time of his apprehension. The right of the plaintiff to apprehend the defendant is a serious question, involving the power of constables, and a wrong decision upon it would affect the liberty of the subject. The words used by the defendant would be no justification for his apprehension, unless he was a party to the affray, and you think that those words show that the affray was still continuing. If the apprehension of the defendant were unlawful, he had, unquestionably, a right to struggle to get away; but if the apprehension was lawful, he had no right to do so, and is answerable for all the consequences."<sup>1</sup>

§ 276. *Officers arresting in public houses.* — Questions not unfrequently arise, says Sir William Russell,<sup>2</sup> as to the authority of constables and other officers to interfere with persons in inns or beer-houses. It is no part of a policeman's duty to turn a person out of an inn, although he may be conducting himself improperly there, unless his conduct tends to a breach of the peace. The plaintiff was using abusive language in an inn to one of the

<sup>1</sup> Cook v. Nethercote, 6 C. & P. 417.      <sup>2</sup> 1 Russ. on Cr. 602.

persons there, on which the owner of the inn sent for a policeman, who, by his direction, took the plaintiff to the station-house. Patteson, J.: "The landlord of an inn or public house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did, is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out by force, and may call in his servants to assist in so doing. He might also authorize a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law; but although it would be no part of a policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance than the owner himself could do."<sup>1</sup> Neither is it the duty of a policeman to prevent a person from going into a room in a public house, unless a breach of the peace was likely to be committed by such person in that room. Upon an indictment for assaulting a policeman in the execution of his duty, it appeared that the policeman was called into a public house to put an end to a disturbance which the defendant was making; he and the landlady were at high words: W. L. interfered, and the defendant was in the act of squaring at him, when the policeman desired the defendant not to make a disturbance; the defendant, who was at the side of the bar, then attempted to go into the parlor, in which a person was sitting; as the defendant attempted to get into the parlor, the policeman collared him, and prevented his going in; he then struck the policeman; neither the landlord nor landlady had desired the policeman to turn the defendant out of the house. Parke, B., said: "The policeman had a right to be in the house, without being called upon either by the landlord or landlady to interfere, but under the circumstances he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlor; and if you think it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlor."<sup>2</sup>

§ 277. But if a person make such a noise and disturbance in a public house as would create alarm and disquiet the neighborhood,

<sup>1</sup> *Wheeler v. Whiting*, 9 C. & P. 262.      <sup>2</sup> *R. v. Mabel*, 9 C. & P. 474 — Parke, B.

this would be such a breach of the peace as would justify a policeman in taking the party into custody, provided it took place in the presence of the policeman. To trespass for false imprisonment the defendant pleaded that he was possessed of a public house, and that plaintiff was in the house, and conducted himself in a riotous, quarrelsome, disorderly, and uncivil manner, and committed a breach of the peace therein; that the plaintiff was requested to depart, and refused, whereupon the defendant gently laid his hands on the plaintiff to remove him, and because the plaintiff violently and forcibly resisted the said removal, the defendant gave him in charge to a watchman, who saw the said breach of the peace; it appeared that a watchman, who was on duty, in consequence of hearing a noise, went into the defendant's public house, where he found the plaintiff and five or six other young men making a disturbance; he led the plaintiff out of the house, and about fifteen yards along the street, and then let him go; he said he would go back and have his revenge, and went towards the public house: the watchman went round his beat, and on his return he heard a person at the door of defendant's house cry "Watch," and he in consequence went in and found the plaintiff sitting down; he then sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar, to resist being put out, on which the watchman took the plaintiff into custody, and took him to the watch-house. Parke, B., said: "There is no doubt that a landlord may turn out a person who is making a disturbance in a public house, though such disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord; and if the watchman in this case saw such assault committed, that would make out the plea. There might, it is true, be a sufficient breach of the peace to justify the defendant, as the landlord of the house, in giving the plaintiff into custody without this assault; and even if there was no assault at all. For if the plaintiff made such a noise and disturbance as would create alarm and would disquiet the neighborhood, and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house,

but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman; the watchman has said he saw the piece of work the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighborhood, this would justify the watchman in turning the plaintiff out, and in taking him into custody, if on his going to the house the second time he found the plaintiff still there."<sup>1</sup>

But unless the peace of the neighborhood be disturbed, or there be danger of the perpetration of a felony, the officer interferes at his own risk.<sup>2</sup>

§ 278. *Officers arresting in private houses.*—An officer may also interfere in case of flagrant breaches of the peace and attempted felonies in private houses.<sup>3</sup> But as to civil suits, the defendant in his own house is privileged from arrest.<sup>4</sup>

§ 279. *Private persons interfering to quell affrays.*—Private persons interfering for the furtherance of public justice should expressly avow their intention, or their killing will be but manslaughter.<sup>5</sup> If the intention, however, be shown, the law is otherwise. Thus, in a case already cited, the prisoner and one W. engaged in a fight, and were separated by the deceased; some time after the fight was renewed, and the deceased again interfered, but being unable to take the prisoner off, called a negro to his assistance who, in the act of separating the combatants, threw the prisoner against the wall. The prisoner then made at the deceased (who endeavored to avoid him) with a knife, and inflicted a mortal wound; it was held that this was a case of murder.<sup>6</sup> When A., in order to prevent B. from fighting with his brother, laid hold of him and held him down, striking no blow, upon which B. stabbed A., it was decided, that if in such case A. did nothing more than was necessary to prevent B. from beating his brother, the killing of him was murder; if otherwise, it would have been manslaughter only.<sup>7</sup>

<sup>1</sup> Howell v. Jackson, 6 C. & P. 723  
— Parke, B. See *infra*, § 285–294.

<sup>2</sup> R. v. Preble, 1 F. & F. 325.

<sup>3</sup> Shaw v. Charitie, 3 C. & K. 21;  
but see more fully *supra*, § 267–274;  
*infra*, 285–294.

<sup>4</sup> See *infra*, § 288.

<sup>5</sup> Fost. 310, 311; U. S. v. Travers,

<sup>2</sup> Wheeler's C. C. 510; 1 East P. C.  
c. 5, s. 58, p. 510. See *supra*, § 198,

239, 240, 241.

<sup>6</sup> State v. Ferguson, 2 Hill S. C. R.  
619.

<sup>7</sup> R. v. Bourns, 5 C. & P. 120.

4th. *Street-walkers and Vagrants.*

§ 280. In such cases there must be reasonable ground of suspicion. The present and more humane opinion in this respect is, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer.<sup>1</sup>

The city officers of the city of St. Louis arrested the defendant as a vagrant, under the city ordinances, and discharged him again upon his promise that he would leave the city within a specified time. After the time had elapsed, the deceased again, without a warrant, arrested defendant under an order from the head of the police, and was killed by defendant in resisting the arrest. It was held that if the arrest by deceased was made solely because defendant had broken his promise to leave the city, it was illegal; but if made because the defendant was at the time a vagrant within the meaning of the city ordinances, then it was legal.<sup>2</sup>

III. WHEN THE ARREST MAY BE MADE.

§ 281. The officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority. But process may be executed in the night-time as well as by day.<sup>3</sup>

A sergeant at mace in the city of London having authority according to the custom of the city, by entry in the porter's book at one of the counters, to arrest one Murray for debt, arrested

<sup>1</sup> Tooley's case, 2 Lord Raym. 1296. It is said that watchmen and beadle have authority, at common law, to arrest and detain in prison, for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of felony having been committed. *Lawrence v. Hedger*, 3 Taunt. 14. And it has been said by Hawkins and others, that every private person may, by the common law, arrest any suspicious night-

walker, and detain him till he give a good account of himself (3 Hawk. P. C. c. 13, s. 6; c. 12, s. 20); and it has been held that a person may be indicted for being a common night-walker, as for a misdemeanor. 2 Hawk. P. C. c. 12, s. 20; Poph. 208; *State v. Maxcy*, 1 McMul. 503.

<sup>2</sup> *Roberts v. State*, 14 Mo. 138. See Wh. Cr. L. 7th ed. § 2990, as to statutes authorizing such arrests.

<sup>3</sup> 9 Co. 66 a; 1 Hale, 457; 1 Hawk. P. C. c. 31, s. 62.



him between five and six in the evening of the 8th of November, saying at the same time, "I arrest you in the king's name, at the suit of Master Radford;" but he did not produce his mace; Murray resisted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal; that the sergeant should have shown his mace; and that a custom stated in the verdict to arrest without process first against the goods was illegal: but the objections were overruled; and judgment was given for the king, and one of the prisoners was executed.<sup>1</sup>

§ 282. Killing a watchman in the execution of his office is not the less murder for being done in the night; and the killing of an officer who arrests on civil process may be murder, though the arrest be made in the night; and in the case of an affray in the night where the constable, or any other person who comes to aid him to keep the peace, is killed, after the constable has commanded in the king's name to the keeping of the peace, such killing will be murder; for though the parties could not discern or know him to be a constable, yet if it were said at the time that he was such officer, resistance was at their peril.<sup>2</sup>

#### IV. OFFICERS TAKING OPPOSITE PARTS.

§ 283. In such case killing is but manslaughter. Where officers, accidentally and without malice, take opposite parts in an affray, and one of them is killed, this, says Lord Hale, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other;<sup>3</sup> but upon this it has been remarked, that perhaps it had been better expressed to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever.<sup>4</sup> If the sheriff, says the same authority, have a writ of possession against the house and lands of A., and A. pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any

<sup>1</sup> Mackalley's case, 9 Co. 65 b.

<sup>2</sup> 1 Hale, 460.

<sup>3</sup> 9 Co. 66 a.

<sup>4</sup> 1 East P. C. c. 5, s. 71, p. 304.

of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ.<sup>1</sup> And in a subsequent case, some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected and endeavored by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and as it was thought for some time had killed her: whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them, notwithstanding which, he proceeded to take them into custody upon the charge of murder; and at first offered to take care also of their prisoner, but the latter was soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly.<sup>2</sup>

V. HOW ARRESTS MAY BE MADE, AND HEREIN OF BREAKING OPEN DOORS.

§ 284. The law on this point is thus recapitulated by Sir William Russell,<sup>3</sup> as follows: In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.<sup>4</sup> In a case where an outer door has been broken open by two constables and a gamekeeper, to execute a warrant granted under the 22 & 23 Car. 2, c. 25, s. 2, to search for, and seize any guns, &c. for destroying game; and it appeared that the door was broken open without the party having been previously requested to open it; the court

<sup>1</sup> 1 Hale, 460.

<sup>2</sup> Anon. Exeter Sum. Ass. 1793;

<sup>3</sup> 1 East P. C. c. 5, s. 71, p. 305.

<sup>4</sup> 1 Russ. on Cr. 627.

<sup>5</sup> Fost. 320; 1 Russ. P. C. 627;

Elsee v. Smith, 1 D. & R. 97; and

see also the excellent notes of Messrs.

Hare & Wallace to Semayne's case, 1

Smith's Leading Cases, 164.

held, that in a case of misdemeanor a previous demand of admittance was clearly necessary before an outer door was broken open. Abbott, C. J., said: "It is not at present necessary to decide how far in a case of a person charged with felony it would be necessary to make a previous demand of admittance before you could justify breaking open the outer door of the house; because I am clearly of opinion, that, in the case of a misdemeanor, such previous demand is requisite." Bayley, J., said, generally: "Even in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door. That point was mentioned in the judgment of the court in *Burdett v. Abbott*."<sup>1</sup> The question as to what should be considered as due notice was much considered in a case where two officers went to the workshop of a person against whom they had an escape warrant, and finding the shop door shut called out to the person, and informed him that they had an escape warrant against him, and required him to surrender, otherwise they said they would break open the door; and, upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the judges were of opinion that no precise form of words was required in a case of this kind; and that it is sufficient if the party has notice that the officer comes not as a mere trespasser, but claiming to act under a proper authority. The judges who differed thought that the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not *ex vi termini*, nor in the notion of law, imply any degree of force, or breach of the peace; and consequently, that the prisoner had not due notice that they came under the authority of a warrant grounded on the breach of the peace; and that, for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers.<sup>2</sup>

The general rule both here and in England undoubtedly is, that in every case, whether criminal or civil, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the assailants proceeded to that extremity.<sup>3</sup> Where, however, a party having been

<sup>1</sup> *Lannock v. Brown*, 2 B. & A. 952; *State v. Oliver*, 2 Houst. 585.

<sup>2</sup> *Curtis's case*, Fost. 135.

<sup>3</sup> Fost. 320; 2 Hawk. P. C. c. 14, s.

arrested escapes into his own house, the officer may, without notice, break the outer door, if the pursuit be immediate, and the defendant's conduct such as to imply a waiver of notice.<sup>1</sup>

§ 285. Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced after the notification, demand, and refusal, which have been mentioned.<sup>2</sup> So where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken; provided that entrance has been first demanded and refused.<sup>3</sup> And it is also settled that where an injury to the public has been committed, in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged may break open doors, if necessary, in order to execute it.<sup>4</sup> And the officer may act in the same manner upon a *capias utlagatum*, or *capias pro fine*,<sup>5</sup> or upon an *habere facias possessionem*.<sup>6</sup> The same force may be used where a forcible entry or detainer is found by inquisition before justices of peace, or appears upon their view;<sup>7</sup> and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute, which gives the whole or any part of such penalty to the king.<sup>8</sup> But in this latter case the officer executing the warrant must, if required, show the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken.<sup>9</sup>

1; 2 Hale P. C. 117; *Kneass v. Fittler*, 2 Serg. & R. 263, 265; *Lannock v. Brown*, 2 B. & A. 592; *Glover v. Whittenhall*, 6 Hill, 597, 599; *State v. Armfield*, 2 Hawks, 246; *Curtis v. Hubbard*, 1 Hill N. Y. 337; *Dent v. Hancock*, 5 Gill, 120, 126; *People v. Hubbard*, 24 Wend. 369; *State v. Hooker*, 17 Vermont, 659; *Hooker v. Smith*, 19 Vermont, 659.

<sup>1</sup> *Allen v. Martin*, 10 Wend. 300; *Com. v. McGahey*, 11 Gray, 194.

<sup>2</sup> *Fost.* 320; 1 Hale, 459. And see 2 Hawk. P. C. c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant,

by a constable or private person. And see *De Gondouin v. Lewis*, 10 A. & E. 120.

<sup>3</sup> *Fost.* 320; 2 Hawk. P. C. c. 14, s. 3; *Curtis's case*, *Fost.* 135; *State v. Oliver*, 2 *Houst.* 585; *Wharton C. L.* § 2941.

<sup>4</sup> *Burdett v. Abbott*, 14 East, 157, where the process of contempt proceeded upon the order of the house of commons; and see *Semayne's case*, *Cro. Eliz.* 909; and *Brigg's case*, 1 *Roll. Rep.* 336.

<sup>5</sup> 1 Hale, 459; 2 Hawk. P. C. c. 14, s. 4.

<sup>6</sup> 1 Hale, 458; 5 Co. 95 b.

<sup>7</sup> 2 Hawk. P. C. c. 14, s. 6.

<sup>8</sup> 2 Hawk. P. C. c. 14, s. 5.

<sup>9</sup> 27 Geo. 2, c. 20.

§ 286. But though a felony has been actually committed, yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion.<sup>1</sup> For where a person lies under a bare suspicion only, and is not indicted, it is said to be the better opinion that the breaking open doors without a warrant, in order to apprehend him, cannot be justified ;<sup>2</sup> or must at least be considered as done at the peril of proving a probable case of guilt against the party so apprehended.<sup>3</sup> But a different doctrine appears to have formerly prevailed upon this point ; by which it was held, that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable may break open doors, though he had no warrant.<sup>4</sup>

§ 287. It is said, that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger ;<sup>5</sup> and it is also said, that if there be disorderly drinking or noise in a house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder.<sup>6</sup> And further, that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers, in either case, he may justify breaking open the doors.<sup>7</sup>

§ 288. But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of the measure for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his fam-

<sup>1</sup> Fost. 321.<sup>5</sup> 2 Hale, 95. See *supra*, § 277-8.<sup>2</sup> 1 East P. C. c. 5, s. 87, p. 322.<sup>6</sup> 2 Hale, 95. See *State v. Oliver*<sup>3</sup> 1 East P. C. c. 5, s. 87, p. 322.<sup>2</sup> *Houst.* 585.<sup>4</sup> 1 Hale, 588 ; 2 Hale, 92 ; 13 Ed.<sup>7</sup> 2 Hawk. P. C. c. 14, s. 8.

4, 9 a ; Whart. C. L. § 2939, 2940.

ily, is admitted; and accordingly, in such cases, an officer cannot justify the breaking open an outward door or window to execute the process.<sup>1</sup> If he do so, he will be a trespasser; and if the occupier of the house resist him, and in the struggle kill him, the offence will be only manslaughter; for if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion that the house is broken with a felonious intent, the killing such officer will be no felony.<sup>2</sup>

§ 289. Sir W. Russell, in the chapter from which the present section is principally drawn, thinks that this rule of every man's house being his castle has been carried as far as the true principles of political justice will warrant, and that it will not admit of any extension.<sup>3</sup> In this country the line has been pushed still farther, it having been held that where one of the family, upon the approach of an officer, ran into the house, attempting unsuccessfully to close the door, and the officer then forced the door entirely open, he was liable to indictment.<sup>4</sup>

§ 290. *Outward* doors or windows are such as are intended for the security of the house against persons from without endeavoring to break in;<sup>5</sup> but if the officer find the outward door open, or it be opened to him from within, he may then break open any *inward* door, if he find that necessary in order to execute his process.<sup>6</sup> Thus, it has been holden that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger.<sup>7</sup> And it has been decided that a sheriff's officer, in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of B., a person residing in such house, — B. having refused to open the door of the room, after being informed by the officer that he had a warrant against him.<sup>8</sup> It was once thought that if the party against whom the process is issued *be not within the house* at the

<sup>1</sup> Cook's case, Crox. Car. 537; Fost. 319.

<sup>5</sup> Fost. 320.

<sup>2</sup> 1 Hale, 458; 1 East P. C. c. 5, s. 87, p. 321-2.

<sup>6</sup> 1 Hale, 458; 1 East P. C. c. 5, s. 87, p. 323.

<sup>3</sup> Fost. 319, 320.

<sup>7</sup> Lee v. Gansel, Cowp. 1.

<sup>4</sup> State v. Armfield, 2 Hawks, 246. See supra, § 541.

<sup>8</sup> Lloyd v. Sandilands, 2 Moore, 207; 8 Taunt. 250. See Hodgson v. Towning, 5 Dowl. P. R. 410.

time, the officer can only justify breaking open doors in order to search for him, after having first demanded admittance;<sup>1</sup> but it has been since ruled that in case the person or the goods of the defendant are contained in the house which the officer has entered, he may break open any door within the house without any further demand.<sup>2</sup> If, however, the house is the house of a stranger and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as, if they are not, he will not be justified.<sup>3</sup>

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed and the upper part open), and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and the officer prevailing, the prisoner shot at and killed him; it was held to be murder.<sup>4</sup>

§ 291. The privilege only extends to the dwelling-house, but it should seem that within the term are comprehended all such buildings as are within the curtilage, and are considered as parcel of the dwelling-house at common law. In trespass the defendant justified an entry into a close and breaking into a barn under a *feri facias*; the plaintiff replied that the door of the barn was shut, and it was adjudged upon demurrer that in such a case the sheriff can break open the door of the barn without a request, in order to take the goods; for it shall be intended to be a barn in a field, and not a barn which is parcel of a house. For the court agreed that if the barn had been adjoining to and parcel of the house, it could not be broken open.<sup>5</sup>

<sup>1</sup> *Ratcliffe v. Burton*, 3 Bos. & Pull. 228.

<sup>2</sup> Per Gibbs, J., in *Hutchinson v. Birch et al.* 4 Taunt. 619.

*Cook v. Birt*, 5 Taunt. 765; *Johnson v. Leigh*, 6 Taunt. 246.

<sup>4</sup> *Baker's case*, 1 Leach, 112; 1 East P. C. c. 5, s. 87, p. 828. It should be observed, that in this case there was proof of a previous resolution in the prisoner to resist the officer,

whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment. See 1 Russ. on Cr. 617.

<sup>5</sup> *Penton v. Browne*, 1 Sid. 186. See the authorities as to what is comprehended under the term dwelling-house at common law. Wh. Cr. Law, 7th ed. 1555, 1677-8.

§ 292. This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their domicile, their ordinary residence, there; for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary.<sup>1</sup> But it should be observed, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant.<sup>2</sup> And an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there he is a trespasser.<sup>3</sup> And it has been decided that a sheriff cannot justify breaking the inner doors of the house of a stranger,

<sup>1</sup> Fost. 320; 5 Co. 93. Mr. Smith, in his learned note to Semayne's case, 1 Sm. Lead. C. 45, after citing the observations of Lord Loughborough in *Sheere v. Brookes*, 2 H. Bl. 120, says: "It seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal."

<sup>2</sup> 2 Hale, 103; Fost. 321; 1 East P. C. c. 5, s. 87, p. 324. Mr. Smith, in the same note, says: "There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favoring his escape, while the officers should be detained in searching, or for any other reason; it might be held that he could not take advantage of his own deceit

so as to treat the sheriff, who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter." It certainly is reasonable in such a case, that the party should not be permitted to show that in fact the defendant was not concealed in the house, and this would be in accordance with the principle established by *Pickard v. Sears*, 6 A. & E. 469; *Heane v. Rogers*, 9 B. & C. 586; *Kieran v. Sanders*, 6 A. & E. 515; and *Gregg v. Wells*, 10 A. & E. 90,—in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. See 1 Russ. on Cr. 632.

<sup>3</sup> *Cooke v. Birt*, 5 Taunt. 765. See 1 Russ. on Cr. 632, from whence this section is taken.



*upon suspicion* that a defendant is there, in order to search for such defendant, and arrest him on *mesne process*.<sup>1</sup>

§ 293. And the privilege is also confined to *arrests in the first instance*. For if a man, being legally arrested,<sup>2</sup> escape from the officer, and take shelter, though in his own house, the officer may, upon fresh pursuit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused.<sup>3</sup> If it be not, however, upon fresh pursuit, it seems that an officer should have a warrant from the magistrate; and it should be observed, that the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal.<sup>4</sup> Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants, it was ruled to be only manslaughter.<sup>5</sup>

§ 294. In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty.<sup>6</sup> So where a sheriff being lawfully in a house makes a lawful seizure of the goods of the owner of the house, and cannot take the goods out of the house without opening the outer door, and neither the owner nor any one else is there so that he can request them to open the door, he may break the door open to take out the goods.<sup>7</sup> It is enough to make the sheriff, in a civil case, a trespasser, that the outer door be shut; for the mere opening, as has been ruled in New York, is a breaking in law, whether it be the bursting of a bolt, the lifting of a latch, or the sliding down

<sup>1</sup> Johnson v. Leigh, 6 Taunt. 246.

& P. 153; George v. Radford, M. & M. 244.

<sup>2</sup> Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest. *Fost.* 320. But bare words will not make an arrest; the officer must actually touch the prisoner. *Genner v. Sparkes*, 1 Salk. 79; *Berry v. Adamson*, 6 B. & C. 528. This, however, may be waived by the person arrested. *Emery v. Chesley*, 18 N. H. 198; *Russen v. Lucas*, 1 C.

<sup>3</sup> *Fost.* 320; *Genner v. Sparkes*, 1 Salk. 79; 1 Hale, 459; 2 Hawk. P. C. c. 14, s. 9. See *Allen v. Martin*, 10 Wend. 300.

<sup>4</sup> 1 East P. C. c. 5, s. 87, p. 324.

<sup>5</sup> *Stevenson's case*, 10 St. Tr. 462.

<sup>6</sup> 2 Hawk. P. C. c. 14, s. 11; 1 East P. C. c. 5, s. 87, p. 324.

<sup>7</sup> *Pugh v. Griffith*, 7 A. & E. 827.

of a window fastened by pulleys.<sup>1</sup> Whatever is breaking in burglary is breaking in the present connection.<sup>2</sup>

VI. HOW FAR THIRD PARTIES MAY RESIST.

§ 295. *A. aiding B., when arrested is in the same position as B.*—Whoever joins with a defendant in resisting process is in the same position, if he have notice, as the defendant himself.<sup>3</sup>

The leading case decided under this head is as follows: One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul, Covent Garden, where he was no constable, and consequently had no authority, and there took up one Anne Dekins, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom Bray had no warrant. The prisoners came up, and, though they were all strangers to the woman, drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he showed them his constable's staff, declared that he was about the queen's business, and intended them no harm. The prisoners then put up their swords, and Bray carried the woman to the round-house in Covent Garden. A short time afterwards, the woman being still in the round-house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners; upon which a person named Dent came to his assistance, and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. This case was elaborately argued, and the judges were divided in opinion; seven of them holding that the offence was manslaughter only, and five that it was murder. The seven judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty, and that it could not be murder if the woman was unlawfully imprisoned; and they also

<sup>1</sup> *Curtis v. Hubbard*, 1 Hill N. Y. R. 337; 4 *Ibid.* 437.

<sup>2</sup> See Wh. C. L. 7th ed. 1535 *et seq.*

<sup>3</sup> Cases hereafter cited in this sec-

tion; and *Boyd v. State*, 17 Geo. 194; *State v. Garrett*, Winston N. C. 144; *Wolf v. State*, 19 Oh. St. 248; *R. v. Dadson*, 2 Den. C. C. 35.

thought that the prisoners, in this case, had sufficient provocation, on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, and much more where it is done under a color of justice;<sup>1</sup> and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob.<sup>2</sup>

§ 296. In Huggett's case,<sup>3</sup> which was relied on in the foregoing, it appeared that Berry and two others pressed a man without any warrant for so doing, to which the man quietly submitted, and went along with them. The prisoner with three others, seeing them, instantly pursued them, and required to see their warrant, on which Berry showed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry, whereupon Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. But this case is stated very differently by Lord Hale, as having been under the following circumstances: A press-master seized B. for a soldier, and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.; and by the advice of all the judges, except very few, it was held to be but manslaughter.<sup>4</sup> In the opinion of Foster, J., the cases just cited, with that of Sir Henry Ferrers,<sup>5</sup> did not warrant the doctrine laid down by the seven judges in the case of Tooley, and he has animadverted upon that doctrine with much force, viewing it as having carried the law in favor of private persons officially interposing in case of illegal arrest further than sound reason, founded on the principles of true policy, will warrant.<sup>6</sup> After observing that, in Huggett's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began; whereas, though in Tooley's case the prisoners had, at the first

<sup>1</sup> R. v. Tooley, 2 Ld. Raym. R. 96.

<sup>4</sup> 1 Hale, 456.

<sup>2</sup> See 1 Russ. on Cr. 633.

<sup>5</sup> Cro. Car. 378.

<sup>3</sup> Huggett's case, Kel. 59.

<sup>6</sup> Fost. 312 *et seq.*

meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party; and also in that case there was no possibility of rescue, the woman having been secured in the round-house; he says that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge for what had before passed, than upon hope or endeavor to assist the woman. He then proceeds: "Now, what was the case of Tooley and his accomplices, stript of a pomp of words, and the colorings of artificial reasoning? They saw a woman, for aught appears a perfect stranger to them, led to the round-house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna Charta and the laws, and in this frenzy to have drawn upon the constable and killed his assistant. It is extremely difficult to conceive that the violation of Magna Charta, a fact of which they were totally ignorant at that time, could be the provocation which led them into this outrage. But admitting, for argument sake, that it was, we all know that words of reproach, how grating and offensive soever, are in the eye of the law no provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knows that affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person, though under the color of justice, possibly can. The indignation that kindles in the breast in one case is instinct, it is human infirmity; in the other it may possibly be *called* a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection than in human infirmity; and it is human infirmity alone that the law indulges in the case of a sudden provocation." By this high authority Tooley's case was greatly shaken, and it may now be considered as entirely overruled.<sup>1</sup> Or

<sup>1</sup> R. v. Warner, R. & M. C. C. R. Pollock, C. B., in R. v. Davis, L. & 385 — Alderson, B. See remarks of C. 64.

if a person present at an affray interfere for the purpose of restraining the offenders and keeping the peace, and be killed ;<sup>1</sup> or if a person present when another attempts to commit a treason or felony lay hold of him in order to prevent him, and be killed ;<sup>2</sup> the killing in these cases would be murder, whether the person arresting or interfering, &c., be a constable or not ; for either has power to arrest or interfere, &c., in such a case.<sup>3</sup>

§ 297. If the party who is arrested yield himself and make no resistance, but others endeavor to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them, but not in the party arrested ; but not so if he do any act to countenance the violence of the rescuers.<sup>4</sup> Thus, when J. having committed a robbery was pursued by the country upon hue and cry, and J. turned upon his pursuers (others of the robbers being in the same field and having often resisted the pursuers), and refusing to yield, killed one of the pursuers ; it was held, that inasmuch as all the robbers were of a company and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from J., were principals, viz., present, aiding and abetting ; and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated J. to kill the party.<sup>5</sup>

§ 298. It is agreed, says Sir William Russell, that if a bailiff or other officer be resisted in the regular discharge of his duty in executing process against a party, and a third person, even the servant or a friend of the party resisting, come in and take part against the officer, and kill him, it will be murder, though he knew him not.<sup>6</sup> But it is suggested that in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority ; and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would

<sup>1</sup> 3 Inst. 52 ; 1 Hawk. c. 31, s. 21 ; 8 C. & P. 282 ; and R. v. Wier, 1 B. Foxt. 310, 311 ; State v. Ferguson, 2 & C. 261.

Hill 8. C. R. 619.

<sup>2</sup> 2 Hawk. c. 14, s. 19.

<sup>3</sup> R. v. Hunt, 1 Mood. C. C. 93 ; R. v. Curran, 3 C. & P. 397 ; R. v. Price,

<sup>4</sup> Kel. 87 ; R. v. Whithorne, 3 C. & P. 394.

<sup>5</sup> Jackson's case, 1 Hale, 464, 465.

<sup>6</sup> 1 Hawk. c. 31 ; 4 Co. 40 b.

it in the servant or friend under the like ignorance.<sup>1</sup> The law upon this point may, perhaps, hardly seem to be reconcilable with that abovementioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging in cool blood in a breach of the peace, by assaulting another instead of endeavoring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril.<sup>2</sup> And upon this principle, if a stranger seeing two persons engaged, one of them a bailiff, attacking the other with a sword, and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff, he must abide the consequences at his peril; but if he interfere, not for the purpose of aiding one party against the other, but *with intent only to preserve the peace and prevent mischief*, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration.<sup>3</sup>

§ 299. Persons interfering to release prisoners cannot take advantage of the informality of the warrant.<sup>4</sup>

<sup>1</sup> 1 East P. C. c. 5, s. 82, p. 316.

<sup>2</sup> 1 Hawk. c. 31, s. 57; 1 East P. C. c. 5, s. 82, p. 316.

<sup>3</sup> 1 Russ. C. & M. 627. See *State v. Hilton*, 26 Mo. 199; *State v. Mur-*

ray, 15 Me. 100. See, as bearing on this topic, *R. v. Luck*, 3 F. & F. 483, and cases cited *supra*, § 200 *et seq.*

<sup>4</sup> *R. v. Allen*, 17 L. T. N. S. 222; *Wh. Cr. Law*, 7th ed. § 1037.

## CHAPTER IX.

### INFANTICIDE.

When death occurs before child has independent circulation, offence is not homicide; otherwise, when the child is born alive and dies after birth, § 303.	Negligent exposure of children is manslaughter, § 304. What constitutes being born alive, § 305. Question one of fact for jury, § 310.
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§ 303. *When death occurs before child has independent circulation, offence not homicide; otherwise, when the child is born alive and dies after birth from injuries prior to birth.*—To kill a child in its mother's womb is no murder; but if the child be born alive, and die after birth through the potion or bruises it received in the womb, it is murder in the person who administered or gave them.<sup>1</sup> Where, also, a blow is maliciously given to a child while in the act of being born, as, for instance, upon the head as soon as the head appears, and before the child has breathed, it will be murder if the child is afterwards born alive, and dies thereof.<sup>2</sup> If the child has been wholly produced from the body of its mother alive, and she wilfully and of malice aforethought strangle it while it is alive, and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord.<sup>3</sup> But it must be proved that the entire child has actually been born into the world in a living state; and the fact of its having breathed, as will be in a moment seen, is not a conclusive proof thereof.<sup>4</sup> It has also been held that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural

<sup>1</sup> 3 Inst. 50; *R. v. Poulton*, 5 C. & P. 329; *R. v. Wright*, 9 C. & P. 754; *Evans v. People*, 49 N. Y. 86.

<sup>2</sup> *R. v. Senior*, 2 Mood. C. C. 346; 3 Inst. 50; 1 Hawk. P. C. c. 31, s. 16; 4 Bl. Com. 198; 1 East P. C. c. 5, s. 14, p. 228; *contra*, 1 Hale, 432; and Staundf. 21. But the reasons on which the opinions of the two last writers seem to be founded, namely,

the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

<sup>3</sup> *R. v. Trilloe*, 1 Car. & Mars. 650; *Evans v. People*, 49 N. Y. 86; *Com. v. Donahue*, 8 Phila. R. 623. See *infra*, § 305.

<sup>4</sup> *R. v. Sellis*, 1 Mood. C. C. 350; *infra*, § 305.

time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder ; and the mere existence of a possibility that something might have been done to prevent the death would not render it less murder.<sup>1</sup>

§ 304. *Exposure of children.*— A principle of much importance bearing on this question, and one that has been more fully discussed in a previous chapter in its general relations, is, that if a person do or omit any act towards another, who is helpless, which act or omission in usual natural sequence leads to the death of that other, the crime amounts to murder if the act or omission be intentional ; but if the circumstances are such that the person would not or could not have been aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind.<sup>2</sup> Thus, where a woman left her child, a young infant, at a gentleman's door, or other place where it was likely to be found and taken care of, and the child died, it would be manslaughter only ; but if the child were left in a remote place, where it was not likely to be found, that is, on a barren heath, and the death of the child ensued, it would be murder.<sup>3</sup> So in a case already cited, where the child was dropped by the mother in a privy and smothered in the soil ; the law was properly declared to be that if the mother, supposing the child to have been born alive, could have procured assistance which would have saved the child's life, but omitted to do so, she would have been guilty of manslaughter.<sup>4</sup>

§ 305. *What constitutes proof that child was born alive.*— Much difficulty is likely to arise on the question whether the death took place after the child was actually born, or whilst it was in the progress of being born ; and although the law be clear that a child must be actually born to be the subject of murder, it is hardly to be considered as settled what constitutes actual birth for this purpose.

<sup>1</sup> R. v. West, 2 Car. & K. 788.

<sup>2</sup> R. v. Walters, *ut supra*. See § 74,

<sup>3</sup> Wh. C. L. 7th ed. § 1002 ; R. v. 134.

Walters, 1 Car. & Mars. 164 ; 2 Lew. 220 ; *supra*, § 74, 184.

<sup>4</sup> R. v. Middleship, 5 Cox C. C. 275.



Thus, where the first count of an indictment charged that the prisoner, being big with a female child, did bring forth the said child alive, and did afterwards strangle it, and other counts varied the statement of the mode of death, but all of them stated the birth of the child as above mentioned ; and it appeared that the dead body of the child was found concealed under the prisoner's bed, with a ribbon tied tightly around the neck, and the evidence of the medical witnesses left it in doubt whether the ribbon was tied round the neck, and the child strangled by it, during the progress of birth, or after the child was fully born, but before the umbilical cord was severed ; and it was submitted that a child could not be the subject of murder till it had a completely independent circulation, and had been wholly detached from the mother ; that the term " born alive " meant the being completely separated from the mother, and having a completely independent circulation ; and a child would not have an independent circulation for some time after it was completely brought forth, unless the umbilical cord was divided. Parke, B., said : " It has been frequently so said in cases where the death has been caused by suffocation, or other injuries, which might have occurred in the course of unassisted delivery, but I should like to know whether there is any case where it has been so held where a wilful wound has been inflicted during the birth of a child. At all events, this indictment will not be supported, unless it be shown that the child was completely born, as it is distinctly averred that the child was brought forth before it was strangled." And in summing up the learned baron said : " Whether there might be any question on a count differently framed, it is not necessary to say ; perhaps there might not ; but in order to convict on the first count you must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. If you think that the child was not killed after it came forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally, while it was connected by the umbilical cord to the mother, and after it was wholly produced, in that case I should put the matter into a course of further inquiry, directing you to convict the prisoner, and reserving the point for a higher tribunal ; my present impression being that it would be murder, if those were the

facts of the case.”<sup>1</sup> Shortly afterwards, upon this case being cited, the prisoner’s counsel admitted that it did not go to the length of deciding that the child must have a separate independent existence from that of the mother, in order to make the killing of it murder ; Vaughan, J., said : “ I should have been very much surprised if it had, because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder.”<sup>2</sup>

§ 306. Where, upon an indictment containing a count for murder by stabbing, and a count charging that before the child was completely born the prisoner stabbed it with a fork, and that it was born, and then died of the stab, it was proved that a puncture was found on the child’s skull, but when that injury was inflicted did not appear, and some questions were asked as to whether the child had breathed. Parke, J., said : “ The child might breathe before it was born ; but its having breathed is not sufficiently life to make the killing of the child murder ; there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose.”<sup>3</sup>

§ 307. Where on an indictment alleging that the prisoner was delivered of a child, and that she afterwards strangled it, it appeared that the child which was found concealed, had breathed, but the medical men could not say when it had breathed, whether during the birth or afterwards ; Littledale, J., told the jury “ the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of the birth.”<sup>4</sup>

§ 308. In a case which has already been noticed, the prisoner was indicted for the murder of her child by cutting off its head, and a surgeon stated that he was enabled to say decidedly that the child had breathed, but he could not swear that the whole body of the child was born when the act of breathing took place. Coltman, J., said : “ In order to justify a conviction for murder, you must be satisfied that the entire child was actually born into the world in a living state. . The fact of its having breathed is

<sup>1</sup> R. v. Crutchley, 7 C. & P. 814.

<sup>2</sup> R. v. Reeves, 9 C. & P. 25.

<sup>3</sup> R. v. Enoch, 5 C. & P. 539 ; R. v. Wright, 9 C. & P. 754.

<sup>4</sup> R. v. Poulton, 5 C. & P. 329.

not a decisive proof that it was born alive ; it may have breathed, and yet died before birth.”<sup>1</sup> It is clear, however, if a child be actually wholly produced alive, it is not necessary that it should have breathed to make it the subject of murder. Upon an indictment for the murder of a child, where it appeared that the dead body of the child was found in a river, and it was proved by two surgeons that it had never breathed ; Park, J. A. J., said : “ A child must be actually wholly in the world in a living state to be the subject of a charge of murder ; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after their birth.”<sup>2</sup>

§ 309. In 1848 a case arose in which it was evident that the intent was to produce an abortion, and the result of the attempt was that the child was produced into the world at such a stage of gestation that it could not live, and died six hours after birth. This was held to be murder. It was proved by Sarah Henson, the mother, on whom the operation had been performed, that she, a single woman, being with child, went to the house of the prisoner, and having informed her of her pregnancy, underwent an operation of the nature described in the indictment. This operation was repeated on several days, and she was shortly afterwards delivered of a male child, — she being then six months advanced in her pregnancy. The child was born alive, but died about five hours afterwards. A medical witness stated that there were no unusual appearances on the body of the child, — that it was a healthy child ; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence. This witness further said : “ Judging from the healthy appearance of the child, I cannot suppose that the premature delivery was spontaneous. The operations described by Henson would naturally and probably produce that premature delivery. It might be produced by a fall or any sudden shock received by the mother ; but in this case, I have no doubt that it was, in fact, produced by the act of the prisoner.” Miller, for the prisoner, said : “ The offence of murder is not proved. The killing of an infant in its mother’s womb is confessedly not murder ; but on the authority of

<sup>1</sup> R. v. Sellis, 7 C. & P. 850.

<sup>2</sup> R. v. Brain, 6 C. & P. 349.

Rex v. Senior, 1 M. C. C. 346, it appears to be laid down by the text-writers as the better opinion, that if an injury be received by the child in the womb, and the child afterwards born alive dies of that injury, it is murder or manslaughter, according to the circumstances of the case." Maule, J. : "That opinion is founded on the authority of Blackstone."<sup>1</sup> Miller : "There must be an assault upon the child ; that circumstance appeared in the case of Rex v. Senior, but is wanting here. The death of the child was caused, if at all by the prisoner, by her bringing it to life. If the act of the prisoner had killed the child in the womb, it would not have been murder ; can it be more so because the child was by the same act brought to life ? There is a statute which expressly provides a punishment for the prisoner's offence."<sup>2</sup> Mellor, for the prosecution : "This is murder. If an injury is inflicted upon a child, which causes its death *en ventre sa mère*, it is not murder ; but if the child is born alive, and dies afterwards in consequence of an injury received in the womb by the unlawful act of the prisoner, that is murder. It does not appear that the body of the child received any direct injury from the operations performed by the prisoner ; but it is born at a time when it cannot maintain for any considerable length of time an existence separate from the mother ; and that premature delivery is caused by the felonious act of the prisoner. The act of the prisoner, being done with intent to procure abortion, is made felonious by 7 Will. 4, and 1 Vict. c. 85, s. 6 ; and being engaged in that felonious transaction, the prisoner thereby caused the premature delivery of Sarah Henson, and the consequent death of the child. The case of Rex v. Senior, although a case of manslaughter only, recognizes the distinction upon which this case depends." Maule, J. : "There is a case for the jury. I think that if, by the felonious act of the prisoner, the child was put into a situation in which he could not live, it is murder." Miller then addressed the jury on the facts. Maule, J. (in summing up), said : "The prisoner is charged with murder ; and the means stated are, that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion ; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.

<sup>1</sup> 4 Com. c. 14, and Coke, 3 Inst. 50.<sup>2</sup> The Stat. 7 Will. 4, and 1 Vict. c.

This, no doubt, is an unusual mode of committing murder; and some doubt has been suggested by the prisoner's counsel whether the prisoner's conduct amounts to that offence; but I am of opinion (and I direct you in point of law) that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder. The evidence seems to show clearly that the death of the child was thereby occasioned by its premature birth; and if that premature delivery was brought on by the felonious act of the prisoner, then the offence is complete." His lordship then read the evidence, and, in conclusion, said: "If the child, by the felonious act of the prisoner, was brought into the world in a state in which it was more likely to die than it would have been if born in due time, and did die in consequence, the offence is murder; and the mere existence of a possibility that something might have been done to prevent the death would not render it less murder. If, therefore, you are satisfied, to the conclusion of any reasonable doubt, that the prisoner, by a felonious attempt to procure abortion, caused the child to be brought into the world, for which it was not then fitted, and that the child did die in consequence of its exposure to the external world, you will find her guilty; if you entertain a reasonable doubt as to the facts, you will, of course, find her not guilty.<sup>1</sup>

§ 310. *Question one of fact for jury.* — Whether the child was born alive is a question of fact to be determined by all the circumstances of the case. Thus where the evidence went to prove that the child was dropped from the mother when she was at a privy, and was smothered in the soil, it was held in the first place a question to be determined by the jury whether the child was alive at the birth.<sup>2</sup>

<sup>1</sup> R. v. West, 2 Car. & Kir. 786,  
787.

<sup>2</sup> R. v. Middleship, 5 Cox C. C.  
275.

## CHAPTER X.

### SUICIDE.

Surviving principal in suicide indictable for murder, § 315.

At common law no conviction of accessaries before the fact, § 317.

Killing when assisting in producing abortion, § 318.

Consent of deceased no bar to prosecution, § 319.

Killing another with his consent to avoid greater evil, § 320.

§ 315. *Surviving principal in suicide indictable for murder.*—Whoever is present, actually or constructively, encouraging the violent and illegal death of another, is responsible for such death, even though it was voluntarily submitted to by the deceased.<sup>1</sup>

<sup>1</sup> *R. v. Sawyer*, 1 Russ. Cr. & M. 670; *R. v. Dyson*, Russ. & Ry. C. C. 528.

On this subject, Lord Macaulay, in his Report on the India Penal Code, writes: "Our reasons for not punishing it (aiding another to commit suicide) so severely as murder are these: In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honor, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts the comrade out of pain; the friend who supplies laudanum to a person suffering the torment of a lingering disease; the freedman who in ancient times held out the sword that his master might fall on it; the high-born native of India who stabs the females of his family at their own entreaty, in order to save them from the licentiousness of a band of marauders,

would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins.

"Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient, of the utmost importance, is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view.

"One end is, that people may not be murdered. Another end is, that people may not live in constant dread of being murdered. This second end is perhaps the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population; but the life of every human being would be passed in con-

Thus if two persons encourage each other to murder themselves together, and one does so, and the other fails in the attempt

stant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles. No murder of suicides, or of homicides committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors."

The authorities bearing on this question are thus given by Geib, *Lehrbuch*, § 88: "The Stoics, as is well known, held that suicide is not necessarily immoral, is frequently praiseworthy, and under certain circumstances is even prescribed by duty. Seneca *Epist.* 70. Nihil melius aeterna lex fecit, quam quod unum introitum nobis ad vitam dedit, exitus multos. Plinius *Nat. Hist.* II. 7, 26. 27. Imperfectae vero in homine naturae praecipua solatia, ne Deum quidem posse omnia. Namque nec sibi potest mortem consciscere, si velit, quod homini dedit optimum in tantis vitae poenis Dio Cassius *Excer. Vatic.* n. 89. p. 207. *εις τὴν αὐτὴν γὰρ τάξιν τὰ πράγματα ἐληλύθει, ὥστε ἀρετὴν νομίζουσαι τὸ αὐτοχειρηνεύεσθαι.* Compare *Ständlin*, 52-71. *Baumhauer Veter. philos. doct.* p. 226-241. 266 sqq. 288-290. 322-326. 335. 336. 338-340. Yet notwithstanding this, the corpse of the

self-murderer, according to the old usage, remained unburied. Servius in *Virg. Aen.* XII. 608. Cautum fuerat in pontificalibus libris, ut qui laqueo vitam finisset, insepultus abiceretur. Seneca *Controv.* VIII. 4. Lex: Homicida in se insepultus abiciatur . . . . Contra hos inventum est, ut aliquid post mortem timerent, qui nec mortem timent. Orelli *Collect. inscripp.* n. 4404. BAEBIVS. GEMELLVS SASSINAS. MVNICIPIBVS SINGVLEIS INCOLEISQ. LOCA SEPVLTVRAE C. S. P. DAT. EXTRA AVCTORATEIS ET QVEI SIBI LAQVEO MANVS ATTVLISSENT ET QVAEI QVAESTVM SPVRCVM PROFESSI ESSENT. Plinius *Nat. Hist.* XXXVI. 15, 107. Quum id opus (cloacas) Tarquinius Priscus plebis manibus faceret essetque labor incertum longior an periculosior, passim conscita nece, Quiritibus taedium fugientibus, novum et inexcogitatum antea posteaque remedium invenit ille rex, ut omnium ita defunctorum figeret crucibus corpora spectanda civibus, simul et feris volucribusque laceranda. As the stoical philosophy, however, advanced in popular estimation, this stigma was withdrawn. Dionysius IX. 54. Valerius Max. V. 8, 3. Tacitus *Annal.* VI. 29 . . . . damnati, publicatis bonis, sepultura prohibebantur: eorum, qui de se statuebant, humabantur corpora, manebant testamenta. But see *L. II. § 3. D. de his qui notant. infam.* (3. 2.) Non solent lugeri, ut Neratius ait, hostes, vel perduellionis damnati, nec suspensiosi, nec qui manus sibi intulerunt, non taedio vitae, sed mala conscientia. By the Roman jurists, neither suicide, nor self-mutilation, was, as a rule, regarded as criminal either in consummation or attempt. *L. 9. § 7. D. de pecul.* (15. 1.) Si ipse

upon himself, he is a principal in the murder of the other.<sup>1</sup> Nor is it necessary to prove that the deceased would have killed him-

*servus sese vulneravit, non debet hoc damnum deducere, non magis, quam si se occiderit vel præcipitaverit: licet enim etiam servis naturaliter in suum corpus saevire.* Baumhauer Diss. de mort. volunt. p. 23-64. Lelièvre Comm. de conat. delinq. p. 145-150. It is true that there is sometimes expressed the qualification that the consent of the senate or emperor was necessary to justify suicide. Valerius Max. II. 6. 7. Quintilian. Declam. 4. 337. Qui causas voluntariæ mortis in senatu non reddiderit, insepultus abiiciatur. Dio Cassius LXIX. 8. Baumhauer Diss. de mort. volunt. p. 27-31. In soldiers, however, the attempt of suicide and self-mutilation were made punishable. L. 38. § 12. D. de poen. (48. 19.) L. 6. § 7. D. de re milit. (49. 16.) Qui se vulneravit, vel alias mortem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris, aut taedio vitæ, aut morbo, aut furore, aut pudore mori maluit, non animadvertatur in eum, sed ignominia mittatur: si nihil tale prætendat, capite puniatur. Per vinum, aut lasciviam lapsis capitalis poena remittenda est, et militiæ mutatio irroganda. L. 5. C. Th. de tiron. (7. 13.) Si quis ad fugienda sacramenta militiæ fuerit inventus truncatione digitorum damnum corporis expedissee, et ipse flammis ultricibus concremetur, et dominus eius, qui non prohibet, gravi condemnatione feriatur. L. 4. 10. C. Th. eod. L. 1. C. Th. de fil. milit. (7. 22.) Valerius Max. VI. 3, 3. Ne in C. quidem Vettieno, qui sinistrae manus digitos, ne bello Italico militaret, sibi absci-

derat, severitas senatus cessavit. Publicatis enim bonis eius, ipsum æternis vinculis puniendum censuit: effecitque, ut, quem honeste spiritum profundere in acie noluerat, turpiter in catenis consumeret. The canon law, among other great ameliorations introduced by it, boldly enacted that suicide, and attempting suicide, were to be treated as infamous, and, as far as possible, amenable to penal discipline. Lactantius Instit. III. 18. Nam si homicida nefarius est, quia hominis extinctor est, eidem scelerei obstrictus est, qui se necat, quia hominem necat. Immo vero maius esse id facinus existimandum est, cuius ultio deo soli subiacet. can. 9-12. Caus. 23. qu. 5. Placuit, ut qui sibi ipsis voluntarie, aut per ferrum, aut per venenum, aut per præcipitum, aut per suspendium, vel quolibet modo, violentam inferunt mortem, nulla prorsus pro illis in oblatione commemoratio fiat, neque cum psalmis ad sepulturam eorum cadavera deducantur. cap. 11. X. de sepult. (3. 28.) Baumhauer Diss. in loco. The reasons for this great and wise change were not merely ethical and spiritual but political. There could be no patient endurance in the state, it was insisted, unless there was patient endurance in the citizen. If the people should resort to suicide to escape trouble, so would the state, and all social order would be at an end. The older Germanic law adopted the same principle, and it was accepted by the ecclesiastical courts of England. On the principle heretofore announced, that the ethical precepts of the English ecclesiastical law are incorporated in the common law of the United States, sui-

<sup>1</sup> R. v. Dyson, Russ. & Ry. C. C. R. 528; R. v. Allison, 8 Car. & Payne, 264

410. See Wh. C. L. § 963; R. v. Sawyer, 1 Russ. Cr. & M. 670.



self without the defendant's coöperation. Thus, in a case which came before the supreme court of Massachusetts, the court said: "The government is not bound to prove that Jewett" (the deceased) "would have hung himself had Bowen's" (the defendant's) "counsel never reached his ears. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument, that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the crime without such advice from Bowen. Without doubt he was a hardened and depraved wretch. But it is a man's nature to revolt at the idea of self-destruction. Where a person is pre-determined upon the commission of this crime, the seasonable admonitions of a discreet and respectful friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix

cide, and the attempt at suicide, are to be viewed as common law offences with us. As to the old Germanic law, see Brün, *Schöffenbuch*. The drift of foreign jurisprudence on this topic is worthy of notice. Brunswick, Thuringia, Baden, and Saxony, alone among the German states, punish those who are accessaries to suicide. France has no provision in her codes for such offences; and on the principles of the Roman common law, as well as of the English, an accessary cannot be convicted except on proof of the guilt of his principal. "Car il n'y a point de participation criminelle à un fait qui ne constitue en lui-même ni crime ni delit." Chauveau et Hélie, 1852, vol. III. p. 425. Yet this is limited to cases of suicide proper. When self-killing ceases to be entirely voluntary, in other words, when it is executed under another's compulsion, then that other is guilty

of homicide, though the deceased himself struck the fatal blow. Bertauld, *Cours* (1859), p. 427. Berner, p. 135. § 270. Dum quidam lusor taxillorum ludendo pecuniam perdidisset, instigante diabolo, seipsum voluntarie digitum amputavit. Iudex ergo civitatis eundem capiens a iuratis suis sibi sententialiter inveniri petivit, qualiter esset pro excessu huiusmodi puniendus. Super quo diffinitum fuit, quod homo taliter excedens, tamquam desperatus et nulli bonus, quum sibi ipsi sit malus, a consortio bonorum est merito repellendus. Unde talis a civitate excludatur nunquam ad ipsam, sub poena capitis, quamdiu vixerit reversurus; et in tali emenda est indici satisfactum. Sicut enim iure canonico homo seipsum interficiens cum fidelibus sepeliri non permittitur, sic iuri seculari homo seipsum mutilans habitare cum suis concivibus rationabiliter prohibetur. See *Blackburn v. State*, 23 Oh. St. 165.

the attention, and ultimately procure the perpetration of the dreadful deed. And if other men would be influenced by such advice, the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale. If you are satisfied that Jewett, previous to any acquaintance or conversation with the prisoner, had determined within himself that his own hand should terminate his existence, and that he esteemed the conversation with the prisoner, so far as it affected himself, mere idle talk, let your verdict say so. But if you find the prisoner encouraged and kept alive motives previously existing in Jewett's mind, and suggested others to augment their influence, you will decide accordingly. It may be thought singular and unjust, that the life of a man should be forfeited merely because he has been instrumental in procuring the murder of a culprit within a few hours of death by the sentence of the law. But the community has an interest in the public execution of criminals; and to take such a one out of the reach of the law is no trivial offence. Farther, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider this atrocity of the offence in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him."<sup>1</sup>

§ 316. Two English cases to the same effect are reported. In one<sup>2</sup> of these the prisoner was indicted for the murder of a woman by drowning her. It appeared that the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him; they were in a state of extreme distress, and being unable to pay for their lodgings, they quitted them in the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster Bridge to drown themselves in the Thames; they got into a boat,

<sup>1</sup> *Com. v. Bowen*, 3 Mass. 359; 2 <sup>2</sup> *R. v. Dyson*, R. & R. 523; 8 C. & Wheel. C. C. 321. See comments in *P. 424. See Blackburn v. State*, 23 *Com. v. Dennis*, 105 Mass. 162. Oh. St. 165; *infra*, § 336.

and from that into another boat, the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water; but whether by actual throwing of himself in, or by accident, did not appear. He struggled to get back into the boat again, and then found that the woman was gone; he then endeavored to save her, but could not get to her and she was drowned. In his statement before the magistrate he said that he intended to drown himself, but dissuaded the woman from following his example. The learned judge told the jury that if they believed that the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder. He also told the jury, that although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. But the learned judge thought it right to submit his direction to the consideration of the judges. After considering the case, the judges were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them, and the prisoner was recommended for a pardon. So where upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, both agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down on the same bed together, wishing to die in each other's arms, and the woman

died, but the prisoner recovered; Patteson, J., told the jury that, supposing the parties mutually agreed to commit suicide, and one only accomplished that object, the survivor would be guilty of murder in point of law.<sup>1</sup> So also where a husband and wife, being in extreme poverty and great distress of mind, the husband said, "I am weary of life, and will destroy myself," upon which the wife replied, "If you do, I will too." The man bought some poison, mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and, inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and the jury, under the direction of the judge, pronounced a verdict of not guilty.<sup>2</sup>

§ 817. *At common law there can be no conviction of accessories before the fact to suicide.* — As at common law the principal must be convicted before a conviction of the accessory, there can be no conviction of an accessory before the fact to suicide, from the fact that the suicide is beyond the process of the courts.<sup>3</sup> But by statutes in England and several of the United States, the advising another to commit suicide is made a substantive indictable offence.<sup>4</sup>

§ 818. *Killing when assisting in producing an abortion.* — A woman desires to miscarry of a child with which she is pregnant, and assents to an operation being performed on her for this purpose; and she dies from the operation. Her assent, as we have already seen, is no defence to an indictment against the person performing the operation.<sup>5</sup> If the intent was to kill or grievously injure her, the offence is murder; it is manslaughter if the intent was only to produce the miscarriage, the agency not being one from which death or great injury would be likely to result.<sup>6</sup> But suppose the operation be one which is essential to the preservation of the mother's life? In this case the fact of

<sup>1</sup> R. v. Allison, 8 C. & P. 418.

<sup>2</sup> Anon. cited by Patteson, J. 8 C. & P. 423.

<sup>3</sup> R. v. Leddington, 9 C. & P. 79; R. v. Russell, 1 M. C. C. 356; R. v. Fretwell, 1 Mood. C. C. 356.

<sup>4</sup> See supra, § 316; infra, § 328. As to Ohio, see Blackburn v. State, 23 Oh. St. 165; infra, § 336.

<sup>5</sup> See supra, § 66, 192.

<sup>6</sup> R. v. Gaylor, D. & B. C. C. 288; 7 Cox C. C. 288. Infra, § 348.

such necessity is, as will be presently seen, a defence, in case the operation terminates fatally.

§ 319. *Consent of deceased no bar to prosecution for homicide.* — This is a general axiom acknowledged by all schools of jurisprudence, and rests on the maxim, *Jus publicum privatorum voluntate mutari nequit*. Of this we have a remarkable illustration in a Pennsylvania case, in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case, especially one of high degree, does not estop the defendant from bringing such writ. The question arose after a conviction of burglary, where it was alleged that the defendant had agreed in writing not to bring a writ of error, and where a motion to quash the writ was on this ground made. But Tilghman, C. J., in refusing the motion, said: "What consideration can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases, the same."<sup>1</sup>

§ 320. *Killing another with his consent in order to avoid greater evil.* — It has just been seen that the consent of the deceased is no defence to an indictment for murder; for no one can by consent validate the taking of his own life. But suppose A. is assailed by a fatal disease for which the only escape is a dangerous surgical operation; and that this operation is skilfully performed by B. at A.'s request, but that A. dies under the knife? On this point, Lord Macaulay, in his Report on the India Penal Code, says: "It is often the wisest thing a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigor. We do not conceive that it would be expedient to punish the surgeon who

<sup>1</sup> Smith v. Com. 14 S. & R. 70.

should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death." The same rule applies, as has been argued by Bar, an able German jurist, in cases where consent, on account of mental incapacity, cannot be given. Suppose a dangerous operation is required as the last hope of resuscitating an unconscious person. If the operation is performed with the skill usual to surgeons under such circumstances, this is a good defence if death ensue.<sup>1</sup>

<sup>1</sup> See *infra*, § 550.

## CHAPTER XI.

### PRINCIPALS AND ACCESSARIES.

#### I. PRINCIPALS IN THE FIRST DEGREE, § 325.

Include actual perpetrators, § 325.

Actual presence not necessary when injury is direct, § 326.

Nor when defendant acts through irresponsible medium, § 327.

Suddenly intervening parties not necessarily principals, § 328.

Accessory cannot be convicted as principal, § 329.

When husband and wife may be joined, § 331.

Non-resident principals amenable, § 332.

#### II. PRINCIPALS IN THE SECOND DEGREE, § 333.

Include all present assisting, § 333.

Confederacy is essential, § 334.

In duelling, all participants are principals, § 335.

In suicide, persons present assisting are principals, § 336.

All watching outside in homicides are principals in second degree, § 337.

All combining to commit offence to which homicide is incident are principals in homicide, § 338.

But not so as to collateral offences, § 339, 340.

Distinction between two degrees important only when there is a difference in the punishments, § 341.

Conviction of principal in the first degree not necessary to conviction of principal in the second, § 342.

#### III. ACCESSARIES BEFORE THE FACT, § 343.

Include all absent persons procuring murder, § 343.

What solicitation comprises, § 344.

Concealment of design not enough, § 345.

Procurement must continue till homicide, § 346.

Must be to crime actually committed, § 347.

Accessaries in cases of abortion, § 348.

When conviction of principal a prerequisite, § 349.

Such accessory need not be an originator, § 350.

#### IV. ACCESSARIES AFTER THE FACT, § 351.

Include all who shelter felon, § 351.

Felony must be complete, § 352.

Defendant must know felon to be guilty, § 353.

What relationships excuse, § 354.

#### I. PRINCIPALS IN THE FIRST DEGREE.

§ 325. A PRINCIPAL in the first degree is one who is the actor or actual perpetrator of the fact.<sup>1</sup>

§ 326. *Actual presence not necessary when connection between injury and death is direct; e. g. in poisoning.* — But it is not necessary that he should have committed the act with his own hands, or be actually present when the offence is consummated; for if one lay poison purposely for another who takes it, and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree.<sup>2</sup> So is it with one who turns

<sup>1</sup> 1 Hale, 233, 615.

<sup>2</sup> Vaux's case, 4 Co. 44 b; Fost.

out a wild beast with intent to kill any one who the animal may attack.<sup>1</sup>

§ 327. *Nor when defendant acts through irresponsible medium.* — If he acts through the medium of an innocent<sup>2</sup> or insane medium,<sup>3</sup> or a slave,<sup>4</sup> he is guilty as principal in the first degree. Thus, in Sir William Courtney's case, Lord Denman, C. J., charged the jury: "You will say whether you find that Courtney was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and conferring in his acts; and if you do, you will find them guilty, for they are then liable as principals for what was done by his hand."<sup>5</sup> So if a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder, the incitor, though absent when the fact was committed, is *ex necessitate* liable for the act of his agent, and a principal in the first degree.<sup>6</sup> But if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact.<sup>7</sup>

§ 328. *Suddenly intervening parties not necessarily principals.* — While all who are present, aiding and abetting him who inflicts the mortal blow, in case of murder, are principals and crim-

349; R. v. Harley, 4 C. & P. 369; 4 Cranch, 492. See Green v. State, 13 Mo. 382; Collins v. State, 3 Heisk. 14; Halloway v. R. 1 C. & P. 287; R. v. Williams, 1 C. & K. 589; 1 Den. C. C. 39; People v. Bush, 4 Hill, 133; R. v. Michael, 2 Moody C. C. 287; and see supra, § 34.

<sup>1</sup> Fost. 349; 1 Hale, 514.

<sup>2</sup> Infra, § 364-5; R. v. Clifford, 2 Car. & Kir. 201; Collins v. State, 3 Heisk. 14; Com. v. Hill, 11 Mass. 36; Adams v. People, 1 Comstock, 173; R. v. Mazeau, 9 C. & P. 676; R. v. Michael, 9 C. & P. 356; 2 Moody C. C. 287.

<sup>3</sup> Infra, § 344-5; 1 Hale, 19; 4 Bl. Com. 23; R. v. Giles, 1 Moody C. C. 166; R. v. Tyler, 8 Car. & P. 616;

Blackburn v. State, 23 Oh. St. 165; infra, § 336.

<sup>4</sup> Berry v. State, 10 Georgia, 511.

<sup>5</sup> R. v. Mears, 1 Boston Law Rep. 205; Hawk. c. 1, s. 7.

<sup>6</sup> Fost. 340; 1 East P. C. 118; 1 Hawk. c. 31, s. 7; R. v. Palmer, 1 N. R. 96; 2 Leach, 978; Com. v. Hill, 11 Mass. 136; Collins v. State, 3 Heisk. 14; R. v. Michael, 2 Moody C. C. 287; 9 C. & P. 356; R. v. Clifford, 2 C. & K. 201; infra, § 364-5. By statutes in some jurisdictions all accessaries before the fact may be charged as principals. See State v. Cassidy, 12 Kans. 550.

<sup>7</sup> R. v. Stewart, R. & R. 363; or, if he be present, a principal in the second degree. Fost. 349.



inals in the highest degree, it is not every intermeddling in a quarrel or affray from which death ensues that constitutes an aiding and abetting to the murder. If, for instance, two men fight on a former grudge and of settled malice, and with intent to kill, of which the spectators are innocent, and they of a sudden take sides with the combatants and encourage them by words, and death ensue, it will not be murder in such persons.<sup>1</sup>

§ 329. Joint participants may be convicted of different degrees.<sup>2</sup>

§ 330. One indicted as principal cannot be convicted at common law on proof that he was only an accessary before the fact.<sup>3</sup>

§ 331. *When husband and wife may be joined.*—If a husband and wife jointly commit a murder, they have been held to be co-principals, as the doctrine of presumed coercion does not apply to murder.<sup>4</sup> And so she may be convicted as accessary before the fact.<sup>5</sup> But the better view is to require evidence to show independent consent on part of the wife.<sup>6</sup>

§ 332. *A non-resident principal*, though at the time an inhabitant of a foreign state, may be liable for his agent's criminal acts in a particular jurisdiction.<sup>7</sup>

## II. PRINCIPALS IN THE SECOND DEGREE.

§ 333. Principals in the second degree are those who are present aiding and abetting at the commission of the fact. To constitute principals in the second degree there must be, in the first place, a participation in the act committed; and, in the second place, presence either actual or constructive at the time of its commission. But although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavor to prevent the felony, or apprehend the felon.<sup>8</sup> Something must be shown

<sup>1</sup> *State v. King et al.* 2 Rice's S. C. Digest, 106; *infra*, § 343.

<sup>2</sup> *R. v. Salisbury*, Plowd. 97; Wh. C. L. § 434, 3199.

<sup>3</sup> *Hughes v. State*, 12 Ala. 458; *Josephine v. State*, 39 Mississip. 613; *State v. Wyckoff*, 2 Vroom, 65; *R. v. Fallon* 9 Cox C. C. 242; *contra*, *Yoe v. People*, 49 Ill. 410; *supra*, § 203.

<sup>4</sup> *R. v. Manning*, 2 C. & K. 903.

<sup>5</sup> *Ibid.*

<sup>6</sup> See *R. v. Smith*, 8 Cox C. C. 27; *R. v. Wardroper*, 8 Cox C. C. 284.

<sup>7</sup> Whart. Cr. L. 7th ed. § 210 m.

<sup>8</sup> 1 Hale, 439; Fost. 350; *Con-naughty v. State*, 1 Wisc. 169; *Butler v. Com.* 3 Duval, 435; *Piummer v.*

in the conduct of the bystander, which unmistakably evinces a design to encourage, incite, approve of, or in some manner afford aid or consent to the act.<sup>1</sup> It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favor their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting.<sup>2</sup>

He who attempts to strike with a deadly weapon one who is at the same time struck by another with another deadly weapon, is joint principal in the offence.<sup>3</sup>

If a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless the other do acts himself which render him liable as principal.<sup>4</sup> There can be no aider or abettor to an insane principal;<sup>5</sup> for whoever acts with an insane principal in a crime becomes himself principal.<sup>6</sup>

§ 334. *Confederacy essential.* — Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree.<sup>7</sup> But the act must also be the result of the confederacy; and if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act.<sup>8</sup> And if A. is charged with murder, and B. is charged with aiding and abetting him, it is essential to make out the charge as to B., that B. should have been aware of A.'s intention to commit murder.<sup>9</sup>

Com. 1 Bush (Ky.), 76; People v. Ah Ping, 27 Cal. 489.

<sup>1</sup> Connaughty v. State, 1 Wisc. 169.

<sup>2</sup> Jerv. Arch. 4; Thompson v. Com. 1 Metc. (Ky.) 13.

<sup>3</sup> King v. State, 21 Geo. 220.

<sup>4</sup> U. S. v. Libby, 1 W. & M. 221.

<sup>5</sup> R. v. Tyler, 8 C. & P. 616.

<sup>6</sup> Supra, § 327.

<sup>7</sup> R. v. Moyre, 1 Leach. 314; R. v. Standley, R. & R. 305; 1 Russ. 24;

R. v. Passey, 7 C. & P. 282; R. v. Lockett, Ibid. 300.

<sup>8</sup> R. v. White, Russ. & R. C. C. 99;

Com. v. Campbell, 7 Allen. 541; People v. Knapp, 26 Mich. 112; R. v.

Collison, 4 C. & P. 565; R. v. Howell,

9 C. & P. 437; R. v. Skeet, 4 F. & F.

98; infra, § 337; R. v. King, Russ. & R.

C. C. 332; R. v. McMakin, Russ. & R. C. C. 333.

<sup>9</sup> R. v. Cruse, 8 C. & P. 541.

§ 335. *In duelling, all participants are principals.* — In the case of murder by duelling, in strictness, both the seconds are principals in the second degree; yet Lord Hale considers that, as far as relates to the second of the party killed, the rule of law, in this respect, has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree.<sup>1</sup> But all persons present at a prize-fight, having gone thither for the purpose of seeing the prize-fighters strike each other, are principals in the breach of the peace,<sup>2</sup> and all participants in a killing at such fight are guilty of manslaughter.<sup>3</sup>

§ 336. *Persons aiding suicide guilty as principals.* — As has been just seen,<sup>4</sup> if one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either.<sup>5</sup> Whether the advice of the defendant was the exclusive cause of the suicide is, it seems, immaterial. Thus, in an early case in Massachusetts,<sup>6</sup> it was said by Parker, C. J., in charging the jury: "The important fact to be inquired into is, whether the prisoner was instrumental in the death of Jewett (the deceased), by advice or otherwise. The government is not bound to prove that Jewett would not have hung himself had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is in itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given." All present at the time of committing such offence are principals, although only one acts, if they are confederates, and engaged in

<sup>1</sup> *Infra*, § 468-7; 1 Hale, 422, 452; Whart. C. L. 7th ed. § 959, 990, 996, 2674.

<sup>2</sup> *R. v. Perkins*, 4 C. & P. 537; *R. v. Murphy*, 6 C. & P. 103; *R. v. Young*, 8 C. & P. 645. See *Com. v. Dudley*, 6 Leigh, 614; Wh. C. L. § 2674.

<sup>3</sup> *Supra*, § 192.

<sup>4</sup> *Supra*, § 295.

<sup>5</sup> *R. v. Dyson*, Russ. & R. C. C. 523; *R. v. Russell*, 1 Moody C. C. 356; *R. v. Allison*, 8 C. & P. 418.

<sup>6</sup> *Com. v. Bowen*, 13 Mass. 359. See Wharton's *Preced.* 107.

the common design of which the offence is a part.<sup>1</sup> Where, however, the act is done in the absence of the party who incites it, the latter has been held in England not to be amenable to indictment as a principal, because he was not present; nor as an accessary before the fact at common law, because the principal cannot be convicted; nor as guilty of a substantive felony under 7 Geo. 3, c. 64, s. 9, because that statute is to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried.<sup>2</sup> But by subsequent statutes the law in this respect is materially changed.<sup>3</sup>

It should be observed that even where suicide is not regarded as an offence at common law, a person who uses his power over another to induce such other to kill himself is responsible for the homicide. Thus, in a case tried in 1872 in Ohio (where suicide is not a crime, there being in that state no common law crimes), the evidence was that the defendant, Blackburn, gave to the deceased, Mary Jane Lowell, poison, to be taken by her; and there was evidence tending to show that the defendant, by threats of violence or otherwise, forced her to swallow the poison, or forced it down her throat. There was also evidence of a mutual agreement between the parties to commit suicide. The defendant was convicted of murder in the second degree under the Ohio statute making killing by administering poison murder. This was sustained in the supreme court. "To force poison down one's throat," said Welch, J., "or to compel him by threats of violence to swallow it, is an administering of poison. Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put into the hand or into the stomach of the party whose life is to be destroyed by it."<sup>4</sup>

§ 387. *All watching outside and concurring are principals in second degree.* — It has been already seen that when the connection between the injury and death is immediate (as when one leaves poison for another, which the latter takes), the presence

<sup>1</sup> Green v. State, 13 Mo. 382. See supra, § 315-320.

<sup>2</sup> Infra, § 348.

<sup>3</sup> See R. v. Leddington, 9 C. & P. 146. 79; R. v. Russell, 1 Moody C. C. 356. See supra, § 315.

<sup>4</sup> Blackburn v. State, 23 Ohio St.

of the defendant at the time of the injury is not necessary; and so where the defendant acts through an irresponsible medium. So it is not necessary that the party should be actually present, an ear or eye-witness of the transaction, in order to make him principal in the second degree; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. Thus, if he be outside the house, watching to prevent surprise, or the like, whilst his companions are in the house committing the felony, such constructive presence is sufficient to make him a principal in the second degree.<sup>1</sup> One who keeps guard while others act, thus assisting them, is, in the eye of the law, present and responsible, as if actually present.<sup>2</sup> Yet, although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not, subject to the above qualifications, principals, but accessaries before the fact.<sup>3</sup> Presence, however, during the whole of the transaction is not necessary.<sup>4</sup>

§ 338. *All combining to commit offence to which homicide is incident are principals in homicide.*—All those who assemble themselves together, with an intent even to commit a trespass, the natural execution whereof causes a felony to be committed, and continue together abetting one another till they have actually put their design into execution, and also all those who are present when felony is committed, and abet the doing of it, are principals in the felony.<sup>5</sup> So where persons combine to stand by one another in a breach of the peace, with a general resolution

<sup>1</sup> Fost. 347, 350. See *R. v. Borthwick et al.* 1 Doug. 207; 1 Leach, 66; *Doan v. State*, 26 Ind. 495; *State v. Squaires*, 2 Nev. 226; *Selvidge v. State*, 30 Texas, 60.

<sup>2</sup> *Hawk. c. 29, s. 7, 8*; 1 Russ. 31; 1 Hale, 555; *R. v. Gogerly*, Russ. & R. C. C. 343; *R. v. Owen*, 1 Mood. C. C. 96; *Com. v. Knapp*, 9 Pick. 496; *State v. Hardin*, 2 Dev. & Bat. 407; *State v. Coleman*, 5 Porter, 32. This does not, however, apply where the common purpose is a mere misdemeanor. *R. v. Skeet*, 4 F. & F. 93.

<sup>3</sup> *State v. Town*, Wright's Ohio R. 75; *Com. v. Lucas*, 2 Allen, 170; *Breese v. State*, 12 Ohio St. R. 146;

<sup>4</sup> *R. v. Soares*, R. & R. 25; *R. v. Davis*, Ibid. 113; *R. v. Elsee*, Ibid. 142; *R. v. Badcock*, Ibid. 249; *R. v. Manners*, 7 C. & P. 801.

<sup>5</sup> *R. v. Bingley*, R. & R. 446. See 2 East P. C. 768.

<sup>6</sup> Fost. 351, 352; 2 Hawk. c. 29, s. 9; *R. v. Howell*, 9 C. & P. 437; *Brennan v. People*, 15 Illinois, 511; *Carlington v. People*, 6 Parker C. R. 336.

to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design.<sup>1</sup> So where divers persons resolve severally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, leading to bloodshed, and in doing so happen to kill a man, they are all guilty of murder; for they who unlawfully engage in such bold disturbances of the public peace, in opposition to, and in defiance of, the justice of the nation, must, at their peril, abide the event of their actions. Malice, in such a killing, may be inferred as a presumption of fact from the nature of the design and the character of the preparations; whether the deceased fell by the hand of the accused in particular, or otherwise, is immaterial. So, where two persons go out for the common purpose of robbing a third person, and one of them, in pursuit of such common purpose, kills such third person, under such circumstances as to make it murder in him who does the act, then it is murder in the other.<sup>2</sup> All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but is not only based on the essential principles of justice, but has been found necessary to prevent riotous and felonious combinations committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually giving the blow. Where, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrators.<sup>3</sup> And if the offence is but manslaughter in the person striking the blow,

<sup>1</sup> Dalt. J., c. 161; 1 Hale, 439; v. Campbell, 7 Allen, 541; and *supra*, Hawk. b. 2, c. 29, s. 8; R. v. Howell, § 202.

9 C. & P. 437; Com. v. Hare, 4 Penn. L. J. 257; Williams v. State, 54 Ill. 423; Miller v. State, 25 Wisc. 384;

Ruloff v. People, 45 N. Y. 213; U. S. v. Ross, 1 Gallison, 624; Brennan v. People, 15 Illinois, 511. See, however, remarks of Bigelow, C. J., Com. 202.

<sup>2</sup> R. v. Jackson, 7 Cox C. C. 357.

<sup>3</sup> Com. v. Daley, 4 Penn. Law Journal, 156; Com. v. Neills, 2 Brewster, 553; Moody v. State, 6 Coldw. (Tenn.) 299; R. v. Murphy, 6 C. & P. 103, and cases cited *supra*, § 201,

it is not, without proof of express malice, more than manslaughter in his associates.<sup>1</sup>

§ 339. If, as it was laid down in another case, during a scene of unlawful violence, to which the defendants came prepared to inflict death or great bodily hurt, an innocent third person is slain, who had no connection with the combatants on either side, nor any participation in any of their unlawful doings, such a homicide would be murder, at common law, in all the parties engaged in the affray.<sup>2</sup>

§ 340. But at the same time two cautions must be kept in mind : —

*First.* Persons engaged in a common unlawful (though not felonious) enterprise are not jointly responsible for a homicide accidentally committed by one of them while at the common work.<sup>3</sup>

*Secondly.* A rioter is not responsible for a death caused by those engaged in suppressing the riot ;<sup>4</sup> nor, in an affray, are the original parties responsible for a death caused by strangers breaking independently into the ring.<sup>5</sup>

§ 341. *Distinction between the two degrees is important only when punishments differ.* — The distinction between principals in the first and second degree, it has been said, is a distinction without a difference ; and, therefore, it need not be made in indictments.<sup>6</sup> Such is only the case, however, where the punishment is the same for the two divisions.<sup>7</sup> But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors.<sup>8</sup> So far as concerns murder, however, it is to be noticed that if in the indictment several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material

<sup>1</sup> *R. v. Murphy*, 6 C. & P. 103; *infra*, § 444.

<sup>2</sup> *Com. v. Daley*, 4 Penn. L. J. 259; cited *supra*, § 208; *Com. v. Hare*, 4 Penn. Law Jour. 259.

<sup>3</sup> *R. v. Skeet*, 4 F. & F. 93; *R. v. Collison*, 4 C. & P. 565; *R. v. Howell*, 9 C. & P. 437; *People v. Knapp*, 26 Mich. 112; *R. v. Murphy*, 6 C. & P. 103; *R. v. Turner*, 4 F. & F. 339; *supra*, § 201-2.

<sup>4</sup> *Com. v. Campbell*, 7 Allen, 541.

<sup>5</sup> *R. v. Murphy*, 6 C. & P. 103; *supra*, § 201-2; *infra*, § 819.

<sup>6</sup> *State v. Fley and Rochelle*, 2 Brevard, 338; *State v. Green*, 4 Strobhart, 128; *State v. Davis*, 29 Missouri, 391. See *infra*, § 819.

<sup>7</sup> 2 Hawk. c. 25, s. 64; *Mackally's case*, 9 Co. 67 b; *Fost.* 345. See *infra*, § 819.

<sup>8</sup> 1 East P. C. 348, 350; *R. v. Home*, 1 Leach, 473. See *Rasnicks case*, 2 Virg. Ca. 356; *Hoffman v. Com.* 6 Randolph, 685.

which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present is, in contemplation of law, the injury of each and every of them.<sup>1</sup>

§ 342. *Conviction of principal in the first degree not necessary to conviction of principal in the second.* — If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state the mortal injury was committed by him who is absent or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient.<sup>2</sup> So the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted.<sup>3</sup> So on an indictment for murder, the court may, in their discretion, try the principal in the second degree before the principal in the first degree.<sup>4</sup>

### III. ACCESSARIES BEFORE THE FACT.

§ 343. *Include all persons procuring murder.* — An accessory before the fact is one who, though absent at the time of the commission of the murder, yet procures, counsels, commands, or abets another to commit such murder.<sup>5</sup> The meaning of the word "command" is, where a person having control over another, as a master over a servant, orders a thing to be done.<sup>6</sup> To constitute a man accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal.<sup>7</sup> The accessory is liable for all that ensues upon the

<sup>1</sup> *State v. Mairs*, 1 Coxe's R. 453; *Foster*, 551; *State v. Fley and Rochelle*, 2 Brevard, 338; *R. v. Borthwick*, 1 Doug. 207; 1 East P. C. 350.

<sup>2</sup> *State v. Fley and Rochelle*, 2 Rice's S. C. Digest, 104; 2 Brevard, 338.

<sup>3</sup> *R. v. Taylor*, 1 Leach, 360; *Benson v. Offley*, 2 Shaw, 270; 3 Mod. 121; *R. v. Wallis*, Salk. 334; *R. v. Towle*, R. & B. 314; 3 Price. 145; 2 Marsh. 465; Archbold's C. P. 6;

*Brown v. State*, 28 Geo. 216; *State v. Ross*, 29 Missouri, 32.

<sup>4</sup> *Boyd v. State*, 17 Geo. 194.

<sup>5</sup> 1 Hale, 615. In some states an accessory before the fact may be charged as principal. See, *e. g.* *Kansas: State v. Cassidy*, 12 Kans. 550.

<sup>6</sup> *State v. Mann*, 1 Haywood's N. C. R. 4.

<sup>7</sup> 1 Hale, 615; *R. v. Gordon*, 1 Leach, 515; 1 East P. C. 352.



execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat C., and he beat him so that he dies, A. is accessory to the murder.<sup>1</sup> So if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house.<sup>2</sup> And if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is nevertheless liable as accessory.<sup>3</sup> If procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act.<sup>4</sup> The procurement need not be direct; it is sufficient if one or more persons become the medium through whom the work is done;<sup>5</sup> it may be either by direct means, as by hire, counsel, or command; or indirect, by evincing an express liking, approbation, or adhesion to another's felonious design.<sup>6</sup>

§ 344. *What solicitation comprises.*—It is necessary that the solicitation be made, either directly or indirectly, to the person committing the act.<sup>7</sup> But knowingly to invite a person to a place so that he may be there murdered constitutes, when he is murdered accordingly, the offence.<sup>8</sup>

§ 345. *Concealment of design not enough.*—The concealment of the knowledge that a felony is to be committed will not make the party concealing it an accessory before the fact;<sup>9</sup> nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence.<sup>10</sup>

§ 346. *Procurement must continue till homicide.*—The procurement must continue till the consummation of the offence; for if the procurer of a felony repent, and before the felony is committed actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessory.<sup>11</sup>

<sup>1</sup> 4 Bl. Com. 37; 1 Hale, 617.

<sup>2</sup> R. v. Saunders, Plowd. 475.

<sup>3</sup> Fost. 369, 370.

<sup>4</sup> R. v. Cooper, 5 C. & P. 535.

<sup>5</sup> Fost. 125; R. v. Somerset, 19 St. Trials, 804; R. v. Cooper, 5 C. & P. 535.

<sup>6</sup> 2 Hawk. c. 29, s. 11; People v. Norton, 8 Cowen, 137.

<sup>7</sup> R. v. Blackburn, 6 Cox C. C. 333.

<sup>8</sup> R. v. Manning, 2 C. & K. 903.

<sup>9</sup> 2 Hawk. c. 29, s. 23.

<sup>10</sup> 1 Hale, 616.

<sup>11</sup> 1 Hale, 618. See Goff v. Prime, 26 Ind. 196; Wh. C. L. 7th ed. § 2699. See supra, § 317-326.

§ 347. *Must be to crime actually committed.* — So if the accessory order or advise one crime, and the principal intentionally commit another ; as, for instance, to burn a house, and instead of that he commit a larceny ; or, to commit a crime against A., instead of so doing he commit the same crime against B., the accessory will not be answerable ;<sup>1</sup> but if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise.<sup>2</sup>

As has been seen, a party who procures a felony to be done by an insane or innocent medium, or a slave, is himself liable as a principal in the first degree.<sup>3</sup>

§ 348. *Accessaries in cases of abortion.* — In a reserved case before the English judges, the evidence showed that the prisoner had procured certain drugs and gave them to his wife with intent that she should take them in order to procure abortion. She took them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter : it was held that he was properly found guilty of manslaughter.<sup>4</sup>

In a subsequent case the deceased woman became pregnant by the prisoner, and died from the effects of corrosive sublimate taken by her for the purpose of producing abortion. The prisoner knowingly procured it for the deceased, at her instigation, and under the influence of threats of self-destruction, if the means of producing abortion were not supplied to her. The jury negatived the fact of his having administered it, or caused it to be taken by her : it was held that he was not guilty of murder as an accessory before the fact.<sup>5</sup>

§ 349. *When conviction of principal prerequisite.* — At common law, the conviction of some one who has committed the crime must precede that of one guilty only as accessory.<sup>6</sup> A prisoner does not waive his right to call for the record of such conviction, by pleading.<sup>7</sup> By statutes, however, in force in Eng-

<sup>1</sup> 1 Hale, 617.

L. & C. 161 ; but see 24 & 25 Vict.

<sup>2</sup> Fost. 370 *et seq.* ; but see 1 Hale, 687 ; 3 Inst. 51.

c. 100, s. 58, 59. See *supra*, § 317-320.

<sup>3</sup> *Supra*, § 325.

<sup>4</sup> See *Baron v. People*, 1 Parker C.

<sup>5</sup> *R. v. Gaylor*, 7 Cox C. C. 253 ;

C. 246.

*Dears. & B. C. C.* 288 ; *supra*, § 317.

<sup>7</sup> Fost. 360 ; 1 Hale, 623 ; U. S. v.

<sup>6</sup> *R. v. Fretwell*, 9 Cox C. C. 153 ; Burr, 4 Cranch, 502.

land, and in most of the United States, an accessory may now be tried for the substantive offence, independently of the principal's conviction.<sup>1</sup>

§ 350. *Accessory before the fact need not be originator.* — It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods, or otherwise, he is guilty as accessory before the fact.<sup>2</sup>

#### IV. ACCESSARIES AFTER THE FACT.

§ 351. *Include all who shelter felon.* — An accessory after the fact is one who, when knowing a felony to have been committed by another, shelters, receives, relieves, comforts, or assists the felon, whether he be a principal or an accessory before the fact merely.<sup>3</sup> Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact; as, for instance, that he concealed him in his house,<sup>4</sup> or shut the door against his pursuers, until he should have an opportunity of escaping,<sup>5</sup> or took money from him to allow him to escape, or supplied him with money, a horse, or other necessities, in order to enable him to escape,<sup>6</sup> or that the principal was in prison, and the defendant, before conviction, bribed the jailer to let him escape, or supplied him with materials to effect the same purpose.<sup>7</sup> Merely suffering the felon to escape, however, will not charge the party so doing, such amounting to a mere omission.<sup>8</sup> So if a person supply a felon in prison with victuals or other necessities, for his sustenance;<sup>9</sup> or succor and sustain him if he be bailed out of prison;<sup>10</sup> or professionally attend a felon sick or wounded, although he knew him to be a felon;<sup>11</sup> or speak or write in order to obtain a felon's pardon or deliverance,<sup>12</sup> or advise his friends to write to the witnesses not to appear against him at his trial, and

<sup>1</sup> See Wh. Cr. L. 7th ed. § 135.

<sup>2</sup> *Keithler v. State*, 10 S. & M. 192.

<sup>3</sup> 2 Hawk. c. 29, s. 1; P. Wms. 475.

<sup>4</sup> *Dalt.* 530, 531.

<sup>5</sup> 1 Hale, 619. See 4 Bl. Com. 37.

<sup>6</sup> *Hall's Sum.* 218; 2 Hawk. c. 29, s. 26.

<sup>7</sup> 1 Hale, 621; Hawk. b. 2, c. 29, s. 26; *Archbold*, by Jervis, 9.

<sup>8</sup> 1 Hale, 619.

<sup>9</sup> 1 Hale, 620.

<sup>10</sup> *Ibid.*

<sup>11</sup> 1 Hale, 332.

<sup>12</sup> 26 Ass. 47.

they write accordingly ;<sup>1</sup> or even if he himself agrees, for money, not to give evidence against the felon ;<sup>2</sup> or know of the felony and do not discover it ;<sup>3</sup> it seems that these acts will not be sufficient to make the party an accessary after the fact.

§ 352. Two things are laid down in the books as necessary to constitute a man accessary after the fact to the felony of another.

1. *The felony must be complete.*<sup>4</sup>

§ 353. 2. *The defendant must know that the felon is guilty ;*<sup>5</sup> and this, therefore, is always averred in the indictment.<sup>6</sup> And though it seems to have been doubted whether an implied notice of the felony will not, in some cases, suffice : as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety ;<sup>7</sup> it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge.<sup>8</sup>

§ 354. *What relationships excuse.* — The only relation which excuses the harboring a felon is that of a wife to her husband, because she is considered as subject to his control, as well as bound to him by affection.<sup>9</sup> But at common law no other ties, however near, will excuse ; for if the husband protect the wife, the father his son, or a brother his brother, they contract the guilt, and are liable to the punishment of accessaries to the original felony.<sup>10</sup>

<sup>1</sup> 3 Inst. 139 ; 1 Hale, 620.

<sup>2</sup> Moore, 8.

<sup>3</sup> 1 Hale, 371, 618.

<sup>4</sup> 1 Ch. C. L. 264 ; 1 Hale, 622 ; 2 Hawk. c. 29, s. 35 ; Harrol v. State, 39 Miss. 702.

<sup>5</sup> 1 Hale, 622 ; Hawk. b. 2, c. 29, s. 32 ; Com. Dig. Justices, T. 2.

<sup>6</sup> Hawk. b. 2, c. 29, s. 33.

<sup>7</sup> Dyer, 353 ; Staunf. 41 b.

<sup>8</sup> 1 Hale, 323, 622 ; 3 P. Wms. 475, &c.

<sup>9</sup> 1 Hale, 621 ; Hawk. b. 2, c. 29, s. 34 ; 4 Black. Com. 39 ; Com. Dig. Jus. T. 2 ; R. v. Manning, 2 C. & K. 903.

<sup>10</sup> Ibid. In Massachusetts this is expanded by statute to other near relatives. Gen. Stat. ch. 168, § 6.

## CHAPTER XII.

### CAUSAL CONNECTION.

Death must have resulted from defendant's malice or negligence through ordinary natural laws, § 358.

*Conditions* of a result to be distinguished from its *causes*, § 360.

Omissions when causes of a homicide, § 361.

Effect of interposition of independent wills, § 362.

Effect of intervening voluntary misconduct of others, § 363.

Irresponsible intermediate agent does not break causal connection, § 364.

And so of infants and ignorant persons, § 365.

And so where intermediate agent is affected by fear, § 366.

Defendant not relieved by joint liability of others, § 367.

Death from nervous causes does not involve penal causation, § 368.

Actual physical contact, however, not necessary, § 369.

Deceased's own negligence precipitating his death, § 373.

Self-injury inflicted by fright caused by defendant's misconduct, § 374.

Exposure of helpless persons, § 376.

Deceased's prior negligence no defence if defendant could, by due diligence, have avoided injury, § 378.

When a non-mortal wound is maliciously inflicted, and deceased dies of a mortal wound maliciously inflicted, § 379.

Other diseases co-operating, § 382.

Intervening medical negligence, § 385.

Physician charged with maltreatment, § 386.

Distinctive views of causation in cases of poisoning, § 387.

§ 358. As a general principle we may hold that *the death must have resulted from the malicious or negligent conduct of the defendant, through the ordinary agency of physical laws; and must not have been caused by the interposition of an independent human will not acting in concert with the defendant, or by extraordinary casualties.*<sup>1</sup>

§ 359. The several essentials of this definition will be considered as follows:—

§ 360. *Conditions distinguishable from causes.*<sup>2</sup>—Iron is dug from a mine; is melted in a furnace; is shaped in a factory; is sold, as a weapon, by a tradesman; is used to inflict a fatal blow by an assassin. Now the mining, the melting, the shaping, the selling, are all *conditions* of the murder, without which it could not, in the line in which it was effected, have taken place; but

<sup>1</sup> See Wharton on Negligence, § 73  
*et seq.*

<sup>2</sup> See *infra*, § 814.

neither of these acts is a *cause* of the murder, unless the particular act was done in concert with the murderer, to aid him in effecting his purpose. So a workman places on the roof of a house a tile which a stranger maliciously tears up and throws into a crowded street, killing a passer-by. Now the workman is a condition of the killing, but not its juridical cause, unless the tile was placed so negligently on the roof as to make its dislodgment a result of natural laws, or the stranger, who threw it down, acted in concert with the workman. So also where the defendant inflicts on the deceased a slight wound, in itself not dangerous, which wound, by the maltreatment of a physician, becomes mortal.<sup>1</sup> If, in consequence of some physical idiosyncrasies of the deceased, the wound, which in ordinary cases would not be fatal, produces death, then the defendant is chargeable with the homicide, for the result flowed from the defendant through the agency of natural laws. But if the result is caused by the malpractice of the physician, the wound not being in itself mortal, and the physician not acting in concert with the defendant, then the defendant is not responsible, for the wound, though a condition of the killing, is not its juridical cause.<sup>2</sup> So, as in a case to be more fully discussed hereafter, where the defendant places poison in such a position that it is in the natural course of events swallowed by the deceased, here the defendant is responsible for his malice or negligence, as the case may be.<sup>3</sup> But he is not responsible for the acts of an assassin, who, independently of him, takes and administers the poison to the deceased; for here again, though the preparing of the poison is a condition of the killing, it is not its juridical cause.<sup>4</sup>

An eminent German jurist<sup>5</sup> has stated this proposition somewhat differently. *A man*, he declares, *is in the eye of the law the cause of a phenomenon when he is the condition by which the regular sequence of the phenomena of human life is changed.* This he vindicates by an appeal to one of the examples given above. That iron should be shaped into weapons is an indispensable condition of human life: and so of the manufacturing

<sup>1</sup> See *Harvey v. State*, 40 Ind. 516.

<sup>4</sup> See *State v. Scates*, 5 Jones N. C.

<sup>2</sup> See *supra*, § 144; *R. v. Cheverton*, F. & F. 833.

420; and see *Com. v. Campbell*, 7 Allen, 541.

<sup>3</sup> *R. v. Michael*, 9 C. & P. 356; 2 M. C. C. 120; *infra*, § 389.

<sup>5</sup> *Bar, die Lehre von Causalzusammenhänge*. Leipzig, 1871, p. 11.

and sale of weapons ; and these acts fall within the range of the regular phenomena of human life. Hence neither the miner, nor the manufacturer, nor the merchant is, without some additional element in the case, cause of the killing. So it is in the regular course of life that children should be procreated. But the parents are not the cause, but the condition or prerequisites of the acts of the children. The roof-coverer, who regularly fastens a tile on a roof, is not the cause of a death which results from the hurling of the tile into the street by a gust of wind. Of course the question here hinges on the meaning of the term *regular sequence*, as given in the definition above. By Bar the term is made generally convertible with the *diligentia* of a *bonus paterfamilias*, as used by the civilians. It may be possible, he reminds us, that a greater measure of foresight might have avoided the calamity. This alone does not involve penal responsibility for the consequences. Life necessitates a certain amount of risk, and to multiply checks indefinitely would destroy business enterprise. Negligence (*culpa*) exists only when there is a neglect of precautions which can be readily applied, or which are judicious when viewed in their relation to the undertaking itself.

It has been said that if an act which will produce such an injury to another as the penal law will redress, is done by the defendant with the knowledge that it will produce such results, then the defendant is penally responsible. But this, to follow Bar's argument, is not universally true. The miner, the manufacturer, and the merchant may regard it not only as possible but probable that their staples may be used for guilty purposes, but neither miner, manufacturer, or merchant becomes thereby penally responsible. Even a high probability of injury does not in all cases confer penal responsibility. A sick man, for instance, is suffering from a disease which will cause his death in a few days, unless he submits to an operation which, if it does not cure, will cause death in a few hours. The patient is incapable of expressing his will as to the operation. The operation is undertaken by a surgeon, skilfully, but unsuccessfully. The patient dies, not of the disease, but of the operation. The surgeon foresaw that it was highly probable that the operation would not succeed. But he is nevertheless to be regarded as irresponsible when we assume that his conduct was in conformity with the rules of

science and the maxims of prudent life. If bold operations are never to be attempted, then the advance of surgery is impossible ; and it is reasonable, and in harmony with sound rules of life, that a few days of unconsciousness, or of agonizing pain, should be risked for even a faint probability of recovery.

§ 361. *Omissions.* — This topic is elsewhere noticed at large.<sup>1</sup> At present it may be sufficient, in addition to what has been already said, to observe, adopting the argument of a leading German jurist,<sup>2</sup> that causal connection between the death and the defendant's act is not severed when the defendant, after he has put the external agency on the track of destruction, leaves it to its natural action ; as when, after putting poisoned food on his enemy's table, he waits until the latter himself takes the food ; or where a skilful swimmer, by false representations and promises, entices another in deep water, and then quietly leaves him to drown ; or where a midwife, after cutting the umbilical cord, does not bind it up, so that the child bleeds to death. In all such cases of withdrawal of action, after the destructive agency has been put in motion, there is no question of mere omission (*Unterlassung*). For such withdrawal of action closes almost all crimes of commission ; for the actor brings his train of causes just to the point where that train can be left to itself ; and even when he shoots at an opponent, he simply *lets it happen* (*lasst es nur geschehen*) that the ball goes on its mission, perforates its object, so that the latter by his wound loses his life. But it has been held in England, that on an indictment for manslaughter by causing a fire, it is necessary, in order to sustain the case by an exhaustive process of proof, to show that the fire could not have arisen from any other cause than that charged ; it is necessary to leave no considerable interval of time in which some other cause might have acted.<sup>3</sup>

§ 362. *Effect of interposition of independent, self-determining wills.* — Of course, when the human will comes in as a factor, the degree of certainty with which the future can be calculated is less definite than when we look forward to a sequence of merely physical laws. When the party originating an illegal plan employs others as accomplices or agents, then he becomes accountable for their guilty acts so far as these are within the

<sup>1</sup> *Supra*, § 72.

<sup>2</sup> *R. v. Gardner*, 1 F. & F. 669.

<sup>3</sup> *Berner, Lehrbuch*, 1871, p. 434.



scope of their employment, or in other words, so long as these acts are within the probable contemplation of the employer.<sup>1</sup> But it is otherwise in regard to the acts of independent parties performed on the object of the crime without his concert.<sup>2</sup> Thus, to appeal to an example to be presently more fully examined, is it with regard to a death produced by a physician attending a wound not in itself dangerous. So is it also when the wounded person indulges in excesses which destroy his life, or when he refuses to call in a physician, or to submit to any dressing of the wound.<sup>3</sup> Or, in a case of greater complication, the defendant wounds another so desperately that the latter can only live a few hours, when a third party comes in and kills the wounded man by a blow that acts instantaneously. Who is the cause of the death? Certainly the last assailant; for the particular death which occurred was produced, not by the defendant, or within the range of his action, but by the interposition of a foreign independent will.<sup>4</sup> And so a rioter cannot be held responsible for a homicide by persons engaged in suppressing the riot.<sup>5</sup>

§ 363. *Intervening voluntary misconduct of others.*—Wherever an independent responsible person, disconnected with the defendant, intervenes, this, unless such intervening negligence was an ordinary natural consequence of the defendant's negligence, relieves the defendant from responsibility for injuries directly produced by the intervening act.<sup>6</sup> This point is abundantly discussed elsewhere,<sup>7</sup> and is susceptible of copious illustration. A loaded pistol is negligently left by A. in a store; and B., a customer, coming into the store, under circumstances which impose a duty upon him to know that the pistol was loaded, carries it off, and afterwards, by his negligent use of the pistol, kills C. The causal connection between A.'s negligence and C.'s death is broken by B.'s intervention; though it would be otherwise if B. was a child, playing about A.'s store, and was accustomed to frequent the store, and was permitted by A. to meddle with articles placed in the position in which the pistol

<sup>1</sup> See *supra*, § 72.<sup>5</sup> *Com. v. Campbell*, 7 Allen, 541;<sup>2</sup> *R. v. Ledger*, 2 F. & F. 857. See *supra*, § 339, 340.

Whart. on Neg. § 134.

<sup>6</sup> *R. v. Hilton*, 2 Lewin C. C. 214;<sup>3</sup> See *Harvey v. State*, 40 Ind. 516. *R. v. Ledger*, 2 F. & F. 857.<sup>4</sup> *State v. Scates*, 5 Jones N. C. <sup>7</sup> See Wharton on Negligence, § 134.

was found. A horse is negligently hitched by E. in a country road ; F., a stranger, negligently meddles with the horse, and the horse escapes and injures G. E. is not liable for the injury ; though it would be otherwise if the horse had been negligently hitched in a city street, where in the ordinary course of things he would have been hustled against and loosened. The following cases, reported by Bar, in the able treatise already referred to, are of more difficult solution. The defendant left a loaded gun in a place where, it was assumed, damage would ensue from its negligent or ignorant use. A stranger, playing with the gun, killed inadvertently, and by misadventure, the deceased. By the supreme court (Obertribunal) of Prussia it was held that the defendant's negligence made him criminally responsible for the death of the deceased ; and the reason given was that a person dealing negligently with dangerous mechanical agencies is responsible for all the consequences which might be reasonably contemplated as the result of such negligence. Now if this is limited to merely mechanical or natural results, the statement is true. If a loaded gun is placed in a position where on a mere touch it will be likely to explode, then the party so placing it is liable for the consequences. But when the gun is loaded in the usual way, and the casualty occurs through the independent voluntary action of a stranger, taking the gun from its resting-place and negligently playing with it in a different position and aimed in a new direction, then the causal connection is broken by this interposition of an independent, self-determining will. If the decision above given be correct, then there would be no limit to the responsibility which a single act of negligence would bring. A man, for instance, who owns a vicious horse, will be responsible if he does not exclude the possibility of trespassers mounting the horse and having thereby their necks broken. A host who places on his table rich but indigestible delicacies, would be responsible for an apoplexy incurred by one of his guests overeating such delicacies. The manufacturer of such delicacies would be responsible for the improvident action of the host. No adventurous enterprise, no matter how beneficial to society ; no powerful mechanical agent, could be put in motion without its attaching to its originators all the calamities which the rash advance of such enterprise, or the imprudent use of such power, might generate. Another objection to this extension of

such responsibilities is, that it would be in the power of any subsequent intruder to throw back criminal responsibility on the original projector or organizer, by simply carelessly meddling with his machinery. Thus, for instance, a mischief-maker, by taking up and recklessly using a loaded gun, could bring down a criminal prosecution on him who left the gun exposed; and so a trespasser, maliciously tampering with machinery, could designedly make the mill owner responsible if it be shown that the machinery itself was not so constructed as to bar all such casualties. One man's malice or mischief would thus create another man's guilt.

But to the rule that a condition ceases to be a cause when there is interposed an independent self-determining will, there are several qualifications to be now noticed.

§ 364. *Irresponsible intermediate agent does not break causal connection.*—An unconscious agent, acting in such a way as might ordinarily be expected from the defendant's act, does not, as has just been incidentally observed, break the causal connection even in malicious homicide. Thus in an English case, a woman bought a bottle of laudanum, intending to kill her infant child, and directed the nurse to give the child a spoonful every night. The nurse did not do so, but a little child found the poison, and gave part of it to the defendant's infant, who died therefrom. It was held that the administering of the poison by the child was as much an administering by the defendant as if she had administered it with her own hand.<sup>1</sup>

§ 365. *Nor do infants and persons ignorantly obeying an employer.*—These may be likened to messengers carrying sealed orders, or to expressmen carrying packages. A man, for instance, who sends an explosive machine by express, is as much responsible as he who sends a shell through a mortar. This, indeed, results from the very nature of our proposition, which treats an intermediate agency as diverting responsibility only when such intermediate agency is self-determining.<sup>2</sup>

§ 366. *And so where the intermediate agent is affected by fear.*—Under this head many questions of peculiar interest arise. A horse, for instance, driven by C., drawing a wagon in

<sup>1</sup> R. v. Michael, 9 C. & P. 356; 2 paramour. Blackburn v. State, 23 Oh. M. C. C. 120; supra, § 327. And so St. 165; supra, § 336.  
<sup>2</sup> See supra, § 327.

which A. is sitting, is designedly or negligently frightened by B., and C., losing his power of controlling the horse, so endangers the wagon that A. jumps out, in his alarm, and breaks his neck. Under these circumstances B. is responsible for A.'s death.<sup>1</sup>

An interesting case of this character is reported by Bar as having been decided in Saxony. S., the defendant, was employed as a watchman to an engine in a coal mine, his office being to supervise the machine by which laborers and others were transported up and down the vertical shaft. His duties were prescribed by express rules which required him to remain at his post until the transport box reached the level of the mouth of the shaft, so that those transported in it could safely step out on the earth. Instead of doing this, he left his station, so that the transport box shot upwards some feet above the mouth of the shaft. Two men were in the box. One of them, by catching the fence of the platform at the mouth of the shaft, succeeded in making good his escape. The other, K., attempted this, but instead of landing on the earth, slipped, and fell into the shaft, at whose bottom he was dashed to pieces. The court below held that S. was not responsible for K.'s death, because K.'s death was caused by his own act, breaking the causal connection between S.'s negligence and K.'s death. This ruling, however, was reversed by the supreme court at Dresden, the ground being that K. could not be regarded as a free, self-determining agent; and that his attempted escape, with the calamity that ensued, was imputable to S.'s negligence. A similar result, in an analogous case, has been reached in England.<sup>2</sup>

So also if a person when pursued illegally, under reasonable apprehensions of danger, casts himself into a river, and is drowned, his pursuer, as will be presently more fully seen, is chargeable with his homicide.<sup>3</sup> But if the pursuit be legal, then the pursuer is not responsible for the deceased's death.<sup>4</sup>

§ 867. *Defendant not relieved from responsibility by joint liability of others.* — This is a familiar principle of criminal jurisprudence at which it is now necessary only to glance.<sup>5</sup>

<sup>1</sup> See more fully *infra*, § 374.

<sup>2</sup> *R. v. Williamson*, 1 Cox C. C. 97.

<sup>3</sup> *Infra*, § 374; *R. v. Pitts*, 1 Car. & Marsh. 284. A similar decision was

given in June, 1860, by the supreme court of Prussia. Bar, *ut supra*, p. 61.

<sup>4</sup> *Supra*, § 214.

<sup>5</sup> See *R. v. Haines*, 2 C. & K. 368; and cases cited *supra*, § 144.

§ 368. *Death from nervous causes does not involve penal causation.* — To justify a conviction for homicide, the cause of death must have been *corporal*, not nervous or sentimental; and therefore where a person, either by working upon the fancy of another, or by harsh or unkind usage, puts him into such a passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice.<sup>1</sup>

It is true, as has been just said, that if a person in dread of physical violence flies from the assailant, and in his immediate flight is drowned, the death is imputable to the assailant. But to make up this imputability two conditions are necessary. First, the death must be immediately consequent on the injury. The theory of the case rests on the self-violence being done *convulsively*; on the party assailed being in this respect the passive agent of the assailant. The other condition is that the danger dreaded should be *physical*. Hence an indictment does not lie against A. for killing B. when the death was the result of fright produced by mere threats, there being no physical lesion. So also although A. may die of a broken heart caused by the unkindness of B., B. is not on this ground indictable for killing A. Undoubtedly there is moral guilt in such cases proportionate to the degree of malice. But there is no technical guilt which the law can punish, for the reason that the law has no test to measure the relation of cause and effect in matters purely psychological. How much of the terror or "broken-heartedness," for instance, was due to the patient's own folly or wrong? What legal proof is possible of such terror or "broken-heartedness?" How can the death be, beyond reasonable doubt, traced to either? Hence it is that the law, when the case consists of these bald elements, declines to interpose.<sup>2</sup>

§ 369. *Actual physical contact, however, not necessary.* — Yet we are not to assume that there must be an actual touching by the defendant of the deceased. No such touching exists in cases of poisoning; but no one questions responsibility if poison is deliberately or negligently placed by A. in B.'s way, and B.

<sup>1</sup> 1 Hale, 427, 429; 1 East P. C. c.    <sup>2</sup> Wh. Cr. L. 7th ed. § 941 a. See 5, s. 13, p. 225; Fairlee v. People, 1 1 Hale P. C. 429; 1 East P. C. 225. Illinois, 1.

takes the poison.<sup>1</sup> So, as elsewhere shown,<sup>2</sup> he who acts through an irresponsible agent is immediately responsible for the criminal acts of such agent. So, in the case just put, B., being threatened with violence by A., and honestly believing that flight is the only mode of avoiding the violence, flies, chased by A., and in his terror falls over a precipice. Here there can be no question as to A.'s responsibility.<sup>3</sup> The same rule was held to apply in cases to be hereafter cited at large, where a seaman, forced aloft when unfit for the work, falls from the mast and is drowned,<sup>4</sup> and where a helpless person is left in such a condition on a winter night that he will, under ordinary circumstances, freeze to death.<sup>5</sup>

§ 370. A more difficult case is suggested in the testimony taken in England, in 1874, before the Committee on the Homicide Bill. B., a sick man, is in such a state of nervous prostration that any sudden shock is likely to prove fatal to him. A., knowing B.'s condition, purposely bursts into B.'s chamber, with such a noise and in such a way as to give B. a fatal shock; and B. dies in consequence. In such a case we may go so far as to hold, malice being shown in A., that A. is guilty of murder; or that if A. bursts into the room negligently, he being bound, from the circumstances, to know B.'s condition, then the offence is manslaughter. Or suppose that sleep is necessary to B.'s life, and A., either maliciously or negligently by noise or other modes of acting on B.'s nervous system, keeps B. from sleeping, and B. in consequence dies: certainly B.'s death is under such a state of facts legally imputable to A. If it be true that the jailers of Louis XVII. killed him by depriving him of sleep, it would not be necessary, to charge them with his death, that they should have touched him. Disturbances calculated to prevent sleep, if sufficient to effect their purpose, would be instruments the proof of which would support such a prosecution. Conclusions such as these would be justified on the ground that the death is the natural consequence of the defendant's misconduct.

§ 371. Yet we must repeat that the instruments employed

<sup>1</sup> Supra, § 92.

<sup>2</sup> Supra, § 327, 364.

<sup>3</sup> See remarks of Erakine, J., in *R. v. Pitts*, C. & M. 284; infra, § 374.

<sup>4</sup> *U. S. v. Freeman*, 4 Mason C. C. 505; infra, § 376.

<sup>5</sup> Infra, § 376; *Nixon v. People*, 2 Scam. 267; *R. v. Martin*, 11 Cox C. C. 136.

must be of such a character as to produce effects which are the natural and ordinary physical consequence of the employment of the instruments. When the agencies are merely such as act on the moral system (*e. g.* marital unkindness, the profligacy of children), the law has no tests by which the fatal character of the agencies can be determined. So in cases of fright, the deceased must have acted convulsively. If he deliberately, no matter on what provocation, exposed himself to danger, no criminal prosecution for his homicide lies.<sup>1</sup>

<sup>1</sup> See *State v. Preslar*, 3 Jones Law, N. C. 421. On this subject Mr. Fitz James Stephen, in his testimony before the English Homicide Amendment Committee (1874), remarks:—

“Then the other point in that section, which is an alteration of the existing law, is one which various persons who have seen the bill have remarked upon to me, namely, ‘It is immaterial whether the act by which death is caused did or did not inflict actual injury on the body of the person killed.’ Now with regard to that there are various remarks to be made. In the first place, I think that some of those who favored me with remarks upon the subject, one learned judge in particular, hardly observed that this definition is not a definition of any crime, but is a definition of the act of killing, and if the act of killing were not accompanied by any of the intentions that are stated in the later sections of the bill, the mere fact that a man was killed by some cause which did not inflict actual injury on the body of the person killed would not constitute any crime.

“That answers some objections which may be raised to it, but I would go further by pointing out what the real nature of the rule is, and what I understand to be the principal authority for it. The great authority for the rule (it is repeated of course by other persons of less note in different

shapes) is to be found in Hale’s *Pleas of the Crown*, page 429, and is in these words: ‘If any man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear that the party either dies suddenly or contracts some disease whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet in *foro humano* it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God; and hence it was that before the statute of 1 James 1, c. 12, witchcraft, or fascination, was not felony, because it wanted a trial, though some constitutions of the civil law make it penal.’ Upon that passage I would observe that in the first place I do not think it goes by any means to the length to which modern writers have been apt to carry it, namely, that unless you could show some specific force actually injuring some bodily organ, there can be no murder, but it puts it on this: first, that it is a secret thing; secondly, the passage ends by saying that for this reason witchcraft is not felony. I rather incline myself to think that this is the explanation of the rule. There were very good reasons, one can quite understand, why, when ev-

§ 372. This view was advanced to a questionable extreme in an English case, tried before Denman, J., in the Northern Circuit,

everybody believed in witchcraft, humane people should not wish to extend trials for witchcraft, and should say, 'There is no actual and obvious injury done by these witches, and therefore we will not go into that.'

"But if you accept that principle in its fulness, you arrive at almost monstrous results, and I will just mention a case or two to the committee. I may observe that what I am saying is said with much greater force by Lord Macaulay, in a report which he wrote upon the Indian Penal Code, at the time when they considered this question; he has gone at great length into it, but I will just put a case which I have in my mind.

"Suppose a man wants to murder his wife, and suppose that she is ill, and the doctor says to him, 'She is in a very critical state; she has gone to sleep, and if she is suddenly disturbed she will die, and you must keep her quiet.' Suppose he is overheard repeating this to another man, and saying, 'I want to murder her, and I will go and make all the noise I possibly can for the purpose of killing her.' You may imagine the evidence to be quite conclusive on that point; he goes into the room, makes a noise, and wakes her up with a sudden start, and frightens her, and she does die according to his wish. It seems to me that that act is as much murder as if he had cut her throat.

"Or suppose a case like this: a man has got aneurism of the heart, and his heir knowing that, and knowing that any sudden shock is likely to kill him, suddenly goes and shouts in his ear, and does so with the intent to kill him, and does so kill him. It seems to me that if that man is not punished it is a very great scandal, for

the act is just as bad as if he had killed him in any other manner. The fact is, that the objection to treating such cases as either murder or manslaughter arises from this, that in a general way, in such a case as unkindness, or many other cases of the same kind, you could never prove that the man intended either to kill or cause harm, or that it was common knowledge that there would be harm or death caused; and, therefore, in all those cases in which you would not wish to punish, the person would escape on account of the difficulty of proof. The only cases in which you would ever want to punish would be cases in which the difficulty of proof, by some such means as I have suggested, would be got over."

Blackburn, J., in his evidence, having stated that killing by grief could not in any sense be homicide, Mr. Stephen, when recalled, said:—

"Mr. Justice Blackburn says that to kill a person by grief ought not to be homicide. I say you could hardly ever prove, in point of fact, that it was criminal homicide; because, in order that the homicide may be criminal, the question of intent, as this bill is drawn, must come in, and the question of knowledge; but the fact that it would hardly ever, in fact, be criminal homicide, is no reason why it should not be homicide. I say it would be homicide; and it would be accidental homicide. It would be homicide, because it would cause the person's death; it would be the cause of that death, and that is what I mean by homicide. It would not be criminal homicide, or at any rate nobody could ever prove it to be criminal homicide, for this simple reason, that it is not common knowledge that grief



in February, 1874.<sup>1</sup> The evidence was that T., the defendant, unlawfully and violently assaulted G., a young girl, having in

causes death, nor is it likely, in ordinary cases, to cause death; and therefore, if you find that a person has caused death to somebody, by grieving him, you might say that the man has killed his wife, or that his conduct has killed his father; but you never would say that the man has murdered his father, because you could not show that there was any guilty intention to do it, or any sort of expectation that he would do it; and that answers, I think, Mr. Justice Blackburn. He says that killing a person by grief is not a thing for which a man ought to be hanged. I never said that he ought to be hanged for killing a man by grief. What this bill says is not that a man ought to be punished for killing a man by grief, but that he ought to be punished for killing him in any way whatever with the intent to kill him, or with the knowledge that the act would probably kill him. In short, those words are simply an enlargement of the common law conception of killing, so to speak, and they have nothing whatever to do with criminal homicide. Then I would add to that, that the case is not only *inter apices juris*, but that it is *inter* the very highest *apices juris*. It is a case which never has arisen, I believe, and the strong probability is that it never would arise; and, therefore, it matters really very little in which way the bill is drawn; it is a matter of the very slightest possible importance. Then there are some remarks which are made, I think, by both the learned judges (and the same thing seems, from his questions, to have struck the chairman) upon section 6: 'It is homicide, by threats of immediate and

serious bodily harm, expressed either by words or gestures, or by actual bodily harm, to compel a person to do an act which causes his own death, and which a person so threatened was likely to do in order to avoid such injury.' That seems to have given rise to some difficulty, and I suppose that it cannot have been clearly expressed, although to my mind the meaning seems clear; probably, because I had illustrations in my mind when I drew it, which I did not feel satisfied in putting on paper; but the case which I had in my mind, from which it was taken, was a case of this kind, in which I was counsel. There was a man named Wager, who was tried for murdering his wife by brutal violence of various kinds; he was one of the strongest men I ever saw in my life, and he kicked the poor woman in the most frightful way. In order to escape him, by a sort of last effort, she jumped into a pool full of water, where she was drowned. Well, I defended him, considerably against the grain, on the ground that she had jumped into the water, and had not been knocked in by him; and the judge told the jury, as I thought with perfect truth, that if she had jumped into the water to escape his violence to her life, that would be murder in him just as much as if he had shot her, or had actually kicked her in with his foot."

"There is undoubtedly," says Lord Macaulay, in his Report on the Indian Code, "a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause

<sup>1</sup> R. v. Towers, 12 Cox C. C. 530.

her arms H., the deceased, a child four months and a half old. The child, which was previously very healthy, was greatly

death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death. But if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide.

"Mr. Livingston, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed, there are few parts of his Code which appear to us to have been less happily executed than this. His words are these: 'The destruction must be by the act of another; therefore self-destruction is excluded from the definition. It must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce and do produce some act which is the immediate cause of death it is homicide. A blind man, or a stranger in the dark, directed by words only to a precipice, where he

falls and is killed; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule.'

"This appears to us altogether incoherent. A. verbally directs Z. to swallow a poisonous drug; Z. swallows it, and dies; and this, says Mr. Livingston, is homicide in A. It certainly ought to be so considered. But how, on Mr. Livingston's principle, it can be so considered we do not understand. 'Homicide,' he says, 'must be operated by an act.' Where then is the act in this case? Is it the speaking of A.? Clearly not, for Mr. Livingston lays down the doctrine that speaking is not an act. Is it the swallowing by Z.? Clearly not, for the destruction of life, according to Mr. Livingston, is not homicide unless it be by the act of another, and this swallowing is an act performed by Z. himself.

"The reasonable course, in our opinion, is to consider speaking as an act, and to treat A. as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z.'s death, whether his words operated circuitously by inducing Z. to swallow poison or directly by throwing Z. into convulsions.

"There will indeed be few homicides of this latter sort. It appears to us that a conviction, or even a trial, in such a case would be an event of extremely rare occurrence. There would probably not be one such trial in a century. It would be most difficult to prove to the conviction of any court that death had really been the effect of excitement produced by words. It would be still more difficult to prove that the person who spoke the words anticipated from them an

alarmed at the defendant's violence, accompanied as it was by the screams of G., its nurse; and it became "black in the face, and ever since that day it had convulsions, and was ailing generally from a shock to the nervous system." It died thirty-two days after the assault. Medical testimony was adduced to show that the death was traceable to the sudden fright. Denman, J., said that he "should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be of the nature of accident. The case was different from other causes of manslaughter, *for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child.*" In charging the jury he said: "Mere intimidation, causing a person to die from fright, by working on his fancy, was not murder. But there were cases in which *intimidations have been held to be murder.* If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe his life was in danger, and he were then to back away from them and tumble down a precipice to avoid them, then murder would be committed. Then did, or did not this principle of law apply to the case of such tender years as the child in question. For the purposes of this case he would assume it did not; for the purposes of to-day he should assume that *the law about working upon people by fright did not apply to the case of a child of such tender years as this.* Then

effect which, except under very peculiar circumstances, and on very peculiar constitutions, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and, supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a criminal court that Z., the deceased, was in a very critical state of health; that A., the heir to Z.'s property, had been informed by Z.'s physicians that Z.'s recovery ab-

solutely depended on his being kept quiet in mind, and the smallest mental excitement would endanger his life; that A. immediately broke into Z.'s sick-room, and told him a dreadful piece of intelligence, which was a pure invention; that Z. went into fits and died on the spot; that A. had afterwards boasted of having cleared the way for himself to a good property by this artifice. These things being fully proved, no judge could doubt that A. had voluntarily caused the death of Z.; nor do we perceive any reason for not punishing A. in the same manner in which he would have been punished if he had mixed arsenic in Z.'s medicine."

arose the question which would be for them to decide, whether the death was directly the result of the prisoner's unlawful act — whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that under all the circumstances of the case. . . .

*If the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter.*" The verdict was not guilty, so that the case was not subjected to further judicial consideration. But in harmony with the views heretofore expressed on this point, I must come to a conclusion different from that expressed by Judge Denman on both the points raised by him.

1. I can see no difference between an infant and an adult so far as concerns physical injury self-inflicted in consequence of fright. If the child, frightened by the attack, convulsively jumped from the nurse's arms and was killed, then the defendant was as much responsible for the child's death as he would have been for the death of the nurse, if, in the terror of the shock, she had jumped convulsively from a window, and had been killed. In either case the question would be whether the deceased's death was a natural consequence of the defendant's violence. And the inference that it was would be stronger in the child's case than in the nurse's.

2. If, however, the child's death was produced by merely nervous causes, — *e. g.* fright, there being no physical shock communicated to it, — then there should have been a verdict of not guilty, for the reason that the law has no means of determining the causal connection between a shock purely nervous and physical death. It would have been otherwise, however, had a blow struck at the nurse been communicated through the nurse's body to the child's, as a blow to the nearest in a series of attached balls communicates itself to the furthest. Then, if this blow threw the child into convulsions, causing its death, the case was one of manslaughter.

3. If the convulsions were caused by the nurse's screams, then, if these screams were not the natural results of the defendant's violence, the causal connection between that violence and the death, even supposing such connection existed, was broken.

§ 873. *Deceased's own negligence precipitating his death.* — On the one side we can conceive of a case in which the deceased,

after his wound, commits suicide; and in which, as the death was caused by the suicide, and not by the wound, the allegation in the indictment, that the deceased died of the wound, could not be sustained. On the other side cases constantly occur in which a wounded person neglects some precaution which might have contributed towards his recovery, but in which no one doubts but that the death is chargeable to the wound. The true line is this: if the deceased, in full possession of his senses, causes either deliberately or negligently his own death, then he and not the person inflicting the wound is chargeable for the death, though the latter is indictable for an attempt to kill. But if A. inflicts wounds on B., putting B. in a condition in which he is forced, under circumstances of agitation and distress, to decide between two courses, A. is responsible for the result, no matter how erroneous the choice of B. may ultimately turn out to have been.<sup>1</sup> Hence it has been held that it is no defence that the deceased, had he consented to an amputation, might have recovered.<sup>2</sup>

§ 374. *Self-injury inflicted in fright caused by the defendant's misconduct.*— Suppose A., when on a coach, jumps off to avoid danger, acting unwisely in so doing, yet in confusion of mind

<sup>1</sup> See Whart. on Neg. § 93-4.

<sup>2</sup> R. v. Holland, 2 M. & R. 351. In this case, the deceased had been waylaid and assaulted by the prisoner, and that amongst other wounds he was severely cut across one of his fingers by an iron instrument. The surgeon urged him to submit to amputation of the finger, telling him that unless it were amputated he considered that his life would be in great hazard. The deceased refused to have the finger amputated. The surgeon dressed it, and the deceased attended from day to day to have the wound dressed; at the end of a fortnight, however, lock-jaw came on, induced by the wound on the finger; the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon deposed, that if the finger had been amputated at first, he thought it most probable that the life of the deceased

would have been preserved. It was contended for the prisoner, that the cause of the death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment. Maule, J., however, was clearly of opinion that this was no defence, and told the jury that if the prisoner wilfully and without any justifiable cause inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was, whether in the end the wound inflicted by the prisoner was the cause of the death.

produced by B.'s reckless driving? Or suppose that A., on a railway track, loses his presence of mind through the unexpected and irregular course of a train which is negligently driven; and suppose that when thus confused, he unwisely but unintentionally runs into instead of out of danger? Is A., in either of these cases, the juridical cause of an injury thus produced, or is B., the negligent driver or engineer, the cause? Certainly the latter; for A., on the assumption that he is at the time incapable of responsibly judging, is not a responsible independent agent capable of breaking the causal connection between the defendant's negligence and the injury. It was B.'s negligence that put A. in this dangerous position, and thus forced him to make a choice between perilous alternatives when he was in a condition incapable of cool judgment; and B. is liable for the consequences.<sup>1</sup>

Hence, where the evidence was that the defendant, a husband, beat his wife and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating, and the bruises received by the fall, died; *Heath, J., Gibbs, J., and Bayley, J.*, were of opinion that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself.<sup>2</sup> And where the deceased, from a well grounded apprehension of a further attack, which would have endangered his life, endeavored to escape, and in so doing was fatally injured from another cause, it was held murder.<sup>3</sup>

<sup>1</sup> *R. v. Longbottom*, *infra*, § 378; *Tyngsborough*, 11 Cush. 563; *Indianapolis R. R. v. Carr*, 35 Ind. 510; *Greenleaf v. Ill. Cent. R. R.* 29 Iowa, 47; *Snow v. Housatonic Co.* 8 Allen, 441; *Reed v. Northfield*, 18 Pick. 98. <sup>2</sup> *R. v. Evans*, O. B. Sept. 1812 — *MS. Bayley, J.*; 1 Russ. on Cr. 488. <sup>3</sup> *R. v. Hickman*, 5 C. & P. 151; *R. v. Pitts*, 1 C. & Mars. 284; *supra*, § 369; *Frink v. Potter*, 17 Ill. 406.

So where the defendants carelessly overloaded a ferry-boat, and where the passengers, in a sudden fright, rushed to one side and upset the boat, in consequence of which A. was drowned, it was held that the carelessness of A. and the other passengers was no defence to an indictment for the manslaughter of A.<sup>1</sup>

§ 375. Yet we must remember that if the deceased, in encountering the danger, acted, not convulsively but deliberately, and if, at the same time, the danger was not a natural and probable consequence of the defendant's misconduct, then the causal connection is broken. This view has been properly held to govern where a woman, not convulsively, or in fear, or through force, but of her own will, leaves her husband's house at night and is frozen to death;<sup>2</sup> where a traveller voluntarily or negligently, and not in fear caused by the defendant, collides with a railway car,<sup>3</sup> and where a person assaulted in a boat, not in fright or in necessity, but as a means of steadying himself, seizes another boat and is thus swept overboard.<sup>4</sup>

§ 376. *Exposure of helpless persons.*— It is clear that to put a helpless person in a position of which death is a natural consequence is, in case of death, culpable homicide. This principle has been applied to cases where a boy, having been beaten by the defendant, was left by him in a country lane during a frosty night in January;<sup>5</sup> where a lame person, incapable of moving, and without voice to cry for help, was forced out of a wagon, in a place where he froze to death;<sup>6</sup> where a person carried his sick father against his will, in a severe season, from one town to another, by reason whereof he died;<sup>7</sup> where a woman being delivered of a child left it in an orchard covered only with leaves, in which condition it was killed by a kite;<sup>8</sup> where a child was placed in a hogsty, where it was devoured,<sup>9</sup> and where an infant child was shifted by parish officers from parish to parish, till it

<sup>1</sup> R. v. Williamson, 1 Cox C. C. R. v. Donovan, 4 Cox C. C. 186. See 97. supra, § 74, 186-9.

<sup>2</sup> State v. Preslar, 3 Jones (N. C.) Law, 421.

<sup>3</sup> See Whar. on Neg. § 382.

<sup>4</sup> R. v. Waters, 6 C. & P. 328.

<sup>5</sup> R. v. Martin, 11 Cox C. C. 186 ; a. 6.

if the exposure had been malicious, the offence would have been murder.

<sup>6</sup> Nixon v. People, 2 Scammon, 267.

<sup>7</sup> 1 Hawk. P. C. c. 31, s. 4; 1 Hale, 431, 432.

<sup>8</sup> 1 Hale, 431; 1 Hawk. P. C. c. 31,

s. 6.

<sup>9</sup> 1 East P. C. c. 5, s. 18, p. 226.

died for want of care and sustenance.<sup>1</sup> And such was held to be the law, in a case already frequently cited, where a master, knowing a seaman's debility and incapacity to hold on, forced him to go aloft, whereupon the seaman fell to the deck, and was killed ; Story, J., saying in his charge to the jury : " In respect to the general principles of law applicable to cases of homicide, there has been no controversy at the bar ; and I am spared the necessity of expounding them beyond what has been read from approved authorities. But the circumstances of this case call for an explicit instruction to you upon the points made in the defence. These are : 1. That the death of Whitehead (the seaman, whose death is feloniously charged in the indictment) was solely owing to accident and misadventure in the course of his duty, the fall from the yard not being occasioned by his debility, but by circumstances which might have occasioned it to a healthy seaman ; 2. If his death was not owing to accident or misadventure, but simply to his debility, yet the circumstances of the case do not show that such debility was so known to the master, that the order, that he should go aloft, was unjustifiable or wantonly wrong ; 3. That if the order was not strictly justifiable, still the act was not the result of personal malice to the deceased in particular, nor of brutal and malignant passions or feelings, which establish general malice, and, therefore, in no event can the facts justify a conviction of murder ; 4. That it is not a case even of manslaughter ; for there was not such a want of caution, or such gross negligence in the master, as would, in the absence of malice, justify a verdict of manslaughter. The first inquiry proper for the jury then is, whether Whitehead came to his death by mere accident or misadventure ; or whether it was occasioned by his debility and exhaustion, arising from physical infirmity at the time of his fall from the yard. If occasioned by such debility and exhaustion, the next inquiry ought to be whether that state of debility and exhaustion was fully known to Captain Freeman, when he gave the orders for his, Whitehead's, going aloft. If so, were the circumstances such as that Captain Freeman must, and ought to have foreseen, that the enforcement of his order to go aloft would probably be attended either by death or enormous bodily injury by falling, to Whitehead, so that the jury can justly infer, that it must have been persisted in from personal

<sup>1</sup> Palm. 545.



malice to the deceased, or from such a brutal malignity of conduct as carries with it the plain indications of a heart regardless of social duty, and fatally bent on mischief. If so, it was murder. And it would not vary the case, that the moral force of the authority of the master to compel performance, instead of physical force, produced compliance with the order on the part of Whitehead, although the latter was sensible of his own extreme debility. If the jury are not satisfied that there was either actual malice to the deceased, or constructive malice, arising from brutal malignity, as before mentioned; still, if the circumstances of the case show that there was gross heedlessness, want of due caution, and unreasonable exercise of authority on the part of Captain Freeman, and that he ought to have known, and could not but have known, that Whitehead was unfit to go aloft, and that there was probable and immediate danger to his life in his so doing, then, notwithstanding the absence of such malice, the offence is at least manslaughter. For every act done wilfully, and with gross negligence, by any person, the known effect of which, under the circumstances, must be to endanger life, is, if death ensues, at least manslaughter.<sup>1</sup>

§ 377. So also when the prisoner, her child having been born alive, dropped it on the side of the road without any clothing or covering to protect it from the inclemency of the weather, where it died from the cold, she having wholly concealed the birth of the child till she was apprehended; *Coltman, J.*, in summing up, said: "If a party so conduct himself with regard to a human being, which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such that he must have been aware that the result would be death, the crime would be manslaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be

<sup>1</sup> U. S. v. Freeman, 4 Mason's R. 512, 513, 514.

found by some one else, and preserved, because then it would only be the crime of manslaughter. If a person were to leave a child at the door of a gentleman, the probability would be so great that it would be found, that it would be too much to say that it was murder, if it died; if, on the other hand, a child were left in an unfrequented place, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved.”<sup>1</sup>

§ 378. *Deceased's prior negligence no defence if defendant could by due diligence have avoided injuring deceased.* — Thus if A. is negligently on a road, B. cannot excuse himself for running A. down if by due diligence the collision could have been avoided by B.<sup>2</sup> So, generally, it is no defence that the deceased or his companions by their own negligence contributed to the result, if that result would not have happened without the misconduct of the defendant.<sup>3</sup>

§ 379. *When a non-mortal wound is maliciously inflicted, and*

<sup>1</sup> R. v. Walters, 1 C. & Mars. 164. See Stockdale's case, 2 Lewin, 220. And see supra, § 78-9, 134.

<sup>2</sup> R. v. Longbottom, 3 Cox C. C. 439; R. v. Swindall, 2 C. & K. 229. See infra, § 470 *et seq.* See R. v. Walker, 1 C. & P. 320; Wharton on Negligence, § 355.

<sup>3</sup> See R. v. Kew, 12 Cox C. C. 355; 1 Green's C. R. 95; R. v. Longbottom, 3 Cox C. C. 439; R. v. Swindall, 2 C. & K. 230; R. v. Walker, 1 C. & P. 320; R. v. Haines, 2 C. & K. 368; R. v. Murton, 3 F. & F. 492.

Of R. v. Longbottom, Mr. Stephen, in his testimony before the Homicide Amendment Committee, says:—

“The cases which have been decided are, in an abridged form, something of this kind: suppose an accident on a railway takes place, whereby a man is killed in consequence of the pointsman being drunk, and the engine-driver being rash, and the guard falling asleep, and those three sepa-

rate acts of negligence all combine to cause the death of the passengers, the effect would be, under the decisions, that all three, each and every one, would be guilty of manslaughter. The case of R. v. Longbottom is this: that if the man who is killed had got negligently on the line, it would not excuse any one of the three from manslaughter. The case was this: two drunken men driving violently down a road at night, a man who was, and knew himself to be, deaf, walked in a dark place, though he had been often warned of the danger, and by his negligence in walking there, got run over. It was held that the people who were in the cart were guilty of negligence, although the man who was run over contributed to his own death. That is exactly the case of the servant and the harness. It is a very small matter, but I wanted to show that I had a reason for putting it in the way I did put it.”

*the deceased subsequently dies of a mortal wound non-maliciously inflicted.* — Suppose, for instance, that A. maliciously aims a blow at B. which stuns B., and A., thinking B. to be dead, buries B., and B. dies from being buried alive. Several cases of this kind (*e. g.* one of infanticide) have arisen in Germany, and have been the subject of much learned discussion; and the better opinion, as is argued by Bar in his authoritative work on Causal Connection, is that A. is guilty, so far as concerns the first blow, not of murder, but of an attempt to murder. Such, undoubtedly, would be the result in our own law, should the case come up on an indictment charging murder by the first blow, for as the evidence would not sustain the allegation that the blow killed the deceased, the indictment would fall, and the only way would be to prosecute the defendant for attempt to kill. But how would it be with the death by the burying? Supposing this was the cause of the death, then the defendant is chargeable with manslaughter in killing the deceased, but would not be chargeable with murder, as there was no malice. Hence the defendant, in such a case, is chargeable, first with attempt to murder, and then with manslaughter. In a late English case, where this question is approached, the evidence left it doubtful whether the death was caused by beating or by subsequent exposure. In either case the result, owing to want of malice, would have been only manslaughter; and as the indictment contained counts fitted to either alternative, the court told the jury that if the death was caused either by the blows or the exposure, they were to convict of manslaughter.<sup>1</sup>

§ 380. In a case of earlier date, the indictment charged the death of a child to have been occasioned by exposure to cold. The evidence was, that the child was found in a field, alive, with a contusion on the head, and that it died a few hours afterwards. The medical witnesses stated that the contusion was in itself sufficient to occasion death, and that the exposure might have accelerated it. It was submitted on behalf of the prisoner, that supposing the death to have been accelerated only by the exposure, the count which charged it as the cause could not be supported, and of this opinion was the judge, who tried the case.<sup>2</sup>

§ 381. But this cannot be sustained. Supposing that the exposure accelerated the death, it “caused” the death. The contusion did not kill. The fact that it might have killed had the

<sup>1</sup> *R. v. Marten*, 11 Cox C. C. 136.

<sup>2</sup> *R. v. Stockdale*, 3 Lew. 220.

deceased lived long enough, could not sustain an indictment for killing: 1. Because the averment of death from the wound could not be sustained; 2. Because to allow a conviction for a thing that did not take place, simply because it might have taken place, would require convictions of murdering men still living.<sup>1</sup>

§ 382. *Other diseases coöperating.*—If the wound causes a fever which produces death, the death, on the principles already stated, is imputable to the wound.<sup>2</sup> So if a man, to adopt Lord Hale's statement, be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to circumstances, in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong.<sup>3</sup> That the deceased was laboring at the time of the wound with a mortal disease; or that his constitution was such as to make him peculiarly susceptible to disease in case a wound be inflicted, is in no case a defence.<sup>4</sup> But it is easy to imagine a case in which a slight scratch, by producing local inflammation, might terminate in death; in such case it would seem hard, at the first view, to charge the defendant with a result which would not under ordinary circumstances follow from such a wound. Yet if the de-

<sup>1</sup> See *supra*, § 11.

<sup>2</sup> 1 Hale P. C. 428.

<sup>3</sup> 1 Hale, 428. See *supra*, § 379.

<sup>4</sup> See Wh. Cr. L. 7th ed. § 941; 1 Hale P. C. 428; *R. v. Martin*, 5 C. & P. 128; *R. v. Webb*, 1 M. & R. 405; *R. v. Murton*, 3 F. & F. 492; *R. v. Marten*, 11 Cox C. C. 136; *Rew's case*, Kel. 261; *Com. v. Green*, 1 Ashm. 289; *Com. v. Warner*, 4 McLean, 464; *McAllister v. State*, 17 Alab. 434; *Com. v. Fox*, 7 Gray, 585; *State v. Morea*, 2 Ala. 275. When the court had instructed the jury, that if the deceased "died from a disease not brought on by a blow given by the defendant, you must acquit, no matter what violence the defendant may

have inflicted upon the deceased, if it did not mediate or immediately accelerate her death, there can be no conviction;" it was not error to refuse to also instruct, that if they believe the wounds inflicted on the deceased were not dangerous, and would not have given her any trouble at all, but that by exposure to the rain, and by reason of her intemperate habits, she brought on erysipelas, which caused her death, the jury should acquit the defendant, without regard to the nature or character of the instrument with which the wound was inflicted. *Harvey v. State*, 40 Ind. 516. See *Brown v. State*, 31 Tex. 353; and see *supra*, § 144.

defendant intended to take life, and in shooting, for instance, inflicted a wound which, though not ordinarily dangerous, in the particular case produced lock-jaw, we cannot say that the defendant's death did not ensue in the ordinary course of events from his shooting. The difficulty arises where a scratch is negligently given by a non lethal instrument. Here we can truly say that as the death was not an ordinary consequence of the negligence, there is no imputability of guilt. Supposing, however, a person negligently uses a dangerous instrument, then we must hold he is liable for the consequences, peculiar as they may be, which wounds from this instrument produce. For it is in accordance with the ordinary course of events that a dangerous instrument if negligently used should produce dangerous results.

§ 383. When it appeared that the death was caused by a blow on the back of the neck, and that the deceased was not at the time in a good state of health, and that she was desired to remain in a hospital where she could best be attended to, but would not, Parke, B., said: "It is said that the deceased was in a bad state of health, but that this is perfectly immaterial; as if the prisoner was so unfortunate as to accelerate her death, he must answer for it."<sup>1</sup>

§ 384. Where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, malice not being pretended; and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances; Coleridge, J., told the jury that if a person inflicted an injury upon a person laboring under a mortal disease, which caused that person to die sooner than he otherwise would have done, he was liable to be found guilty of manslaughter, there being no intent to kill; and the question for them was, whether the death of the wife was caused by the disease under which she was laboring, or whether it was hastened by the ill-usage of the prisoner.<sup>2</sup>

<sup>1</sup> R. v. Martin, 5 C. & P. 128.

<sup>2</sup> R. v. Fletcher, 1 Russ. on Cr. 507. In this case Mr. Greaves states that the jury acquitted; the evidence of the surgeon leaving it doubtful whether the death did not arise purely from natural causes. The first and

second counts of this indictment were in the ordinary form where the death has been caused by blows; the third alleged that S. F. was ill of a certain mortal disease, whereof, according to the course of nature, she, after a long space of time (to wit) after the space

§ 385. *Intervening medical negligence.*— Suppose, however, that after the deceased received the wound, he is placed under the charge of a surgeon, who, in probing the wound or otherwise operating on the patient, immediately causes his death. If the surgeon acts negligently or maliciously, and so introduces a new responsible cause between the wound and the death, this, on the principle just stated, breaks the causal connection between the wound and the death. The surgeon is indictable for the homicide: the original assailant only for an attempt. But if the surgeon, following the usual course of practice which good surgeons under the circumstances are accustomed to adopt, occasions death when endeavoring to heal the wound, then the person inflicting the wound is chargeable with the death. For he who does an unlawful act is responsible, as we have just seen, for all the consequences that in the ordinary course of events proceed from the unlawful act. Now it is one of the ordinary consequences of a wound that a surgeon should be called in to treat it; and it is one of the necessary incidents of surgical practice that the patient should die under the knife. And the person inflicting the wound is responsible for this, as one of the consequences which, in the natural course of events, result from his unlawful act.<sup>1</sup> It is no defence, in cases in which the deceased's death is not shown to have been produced by his own negligence or that of his medical attendant, that he might have recovered had a higher degree of professional skill been employed. The law does not exact from physicians the highest degree of professional skill,<sup>2</sup> but only such skill as men of their profession are, under the circumstances, accustomed to apply; and if we should convict

of four months, would have died; that the prisoner assaulted and beat, &c. (in the usual form), S. F., so being sick and ill as aforesaid, giving her divers mortal strokes and bruises, and which said mortal strokes and bruises did then and there greatly hasten and accelerate the death of S. F., of the same disease whereof she was then and there sick and ill as aforesaid, by then and there irritating, causing, and provoking the said disease to operate more violently and speedily than the same would otherwise have done; of

which said mortal disease, so irritated and provoked as aforesaid, S. F. did languish, &c. (in the usual form), on which said day S. F., of the said mortal disease, so irritated and provoked as aforesaid, did die, &c. No objection was made to this count.

<sup>1</sup> *Com. v. Green*, 1 Ashmead, 289; *Com. v. McPike*, 3 Cush. 181; *Parsons v. State*, 25 Alab. 300; *McAllister v. State*, 17 Alab. 434; *Brown v. State*, 31 Tex. 353. See *supra*, § 143-154.

<sup>2</sup> *Whart. Neg.* § 735; *supra*, § 143.

in no cases in which it is not possible to conceive of recovery under another mode of treatment, we would convict in few cases in which death did not immediately follow the wound. The true test is, was the physician attending the deceased guilty of negligence which was the direct cause of death. If not, it is no defence that the deceased, under another form of treatment, might have recovered.<sup>1</sup>

<sup>1</sup> *R. v. Lee*, 4 F. & F. 63; *R. v. Minnock*, 1 Cr. & Dix, 45; *Com. v. McPike*, 3 Cush. 181; *Com. v. Hackett*, 2 Allen, 137; *Com. v. Green*, 1 Ashmead, 289; *U. S. v. Warner*, 4 McLean, 464; *McAllister v. State*, 17 Ala. 434; *State v. Scott*, 12 La. An. 274.

In an Alabama case (*Parsons v. State*, 21 Ala. 301), Goldthwaite, J., said: "The prisoner was indicted for the murder of one Mayo. On the trial of the case below, the evidence was conflicting as to whether the deceased came to his death from a wound inflicted by the defendant, or from the improper treatment which was resorted to by the attending physician, the wound not being considered a mortal one. It was what is termed a 'punctured wound,' and the improper treatment which was relied on was the bringing of its edges together, and sewing it with stitches. The court, upon this evidence, was requested to charge, 'that if the wound was not mortal, but by ill-treatment, or unwholesome applications, the said Mayo died, if it clearly appears that this treatment, and not the wound, was the cause of his death, the defendant should be acquitted.' This charge the court gave, but with the addition, 'that if the ill-treatment relied upon was the sewing up of the wound with stitches or other compresses, that the defendant would not be excused if otherwise guilty,' and this addition or qualification of the charge is relied upon as the ground of reversal. We

all agree that, ordinarily, if a wound is inflicted not dangerous in itself, and death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable. And we agree, also, that if the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment." See *supra*, § 143.

Lord Macaulay, in his Report on the India Penal Code, says:—

"Again, Mr. Livingston excepts from the definition of homicide the case of a person who dies of a slight wound, which, from neglect or from the application of improper remedies, has proved mortal. We see no reason for excepting such cases from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death; yet both these points might be fully established. Suppose such a case as the following: It is proved that A. inflicted a slight wound on Z., a child who stood between him and a large property. It is proved that the ignorant and superstitious servants about Z. applied the most absurd remedies to the wound. It is proved that under their treatment the wound mortified, and the child died. Letters from A. to a confidant are produced. In those

§ 386. *Physician charged with maltreatment.* — In such case the question of due skill and competency comes up.<sup>1</sup> If the death of the deceased was accelerated by the want of the due skill and competency of his physician, then the latter cannot defend himself on the ground that the deceased was at the time laboring under a mortal disease. Thus on a trial for manslaughter through the administration of Morrison's pills, it appeared that at the time of the administration the deceased was ill with the small-pox. Medical witnesses all gave it as their opinion that the exhibition of the pills in such doses must have aggravated the disease under which the deceased labored, and have accelerated his death ; and one of them said that the deceased died of small-pox heightened by the treatment he had received. It was objected that the indictment was not supported by the evidence, which only proved that the deceased died of a natural disorder, accelerated by improper treatment. It might be conceded, for the sake of argument, that if the indictment had so stated the case it might have been sufficient ; but the indictment made quite a different charge, viz., that the party died wholly and solely of a mortal sickness caused by the medicine and improper treatment. Lord Lyndhurst, C. B., said : " It is true the witnesses do not say whether the deceased would, in their opinion, have died of the small-pox if the pills had not been administered ; but they all agree in this, that his death was accelerated by the pills. Now, their evidence being translated, comes

letters A. congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation the mode of treatment followed by the people who have charge of Z., and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. It appears to us, that if such evidence were produced, A. ought to be punished as a murderer.

" Again, suppose that A. makes a deliberate attempt to commit assassination. In the presence of numbers he aims a knife at the heart of Z. But the knife glances aside, and he inflicts

only a slight wound. This happened in the case of Jean Chatel, of Damien, of Guiscard, and of many other assassins of the most desperate character. In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere afterwards, and that, in consequence, he is attacked with tetanus and dies. Here again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A. as a murderer."

<sup>1</sup> See *supra*, § 141, 154 ; Whart. on Neg. § 735.



to this, that the party died on the day when he did die, viz., on the 27th of June, by reason of taking the pills. At present, therefore, it appears to me that the indictment was good." And in summing up, Lord Lyndhurst adhered to the opinion he had already expressed on the argument, and left it to the jury to say, "whether the death of the deceased had been occasioned or accelerated by the medicines administered by the prisoner."<sup>1</sup>

§ 387. *Distinctive view in cases of poisoning.* — "If B.," as is argued in another work,<sup>2</sup> "negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison. But suppose that A. has ground to suspect that the drug is poisonous, and then, instead of testing it, sells it or gives it to C.? Now, in such a case there can be no question that A. is liable for the damage caused by his negligence. But if A. is unconscious of the mistake, and acts merely as the unconscious agent of B., then there is no causal connection between A.'s agency, and the injury, and B. is directly liable to C."<sup>3</sup> Beyond this it is not safe to go. It is true that in a New York case,<sup>4</sup> the liability was pushed still further; but wherever an intelligent third party comes in, and negligently passes the poison to another, this breaks the causal connection, and makes such intervening negligence the juridical cause."

§ 388. A more difficult question arises when poison intended to kill A. is voluntarily taken by B., who has notice that the drink is suspected to be poisonous. Agnes Gore, in an old case,<sup>5</sup> was proved to have mixed poison in an electuary, of which her husband and her father and another took part and fell sick. Martin, the apothecary who had made the electuary, on being questioned about it, to clear himself took part of it and died. On this evidence a question arose, whether Agnes Gore had committed murder; and the doubt was, because Martin, of his own will, without invitation or procurement of any, had not only eaten of the electuary, but had, by stirring it, so incorporated the poison with the electuary, that it was the occasion of his death. The judges resolved that the prisoner was guilty of the murder of

<sup>1</sup> R. v. Webb, 1 M. & R. 405.

<sup>2</sup> Wh. on Neg. § 91.

<sup>3</sup> Norton v. Sewall, 106 Mass. 143.

<sup>4</sup> Thomas v. Winchester, 2 Selden, 397.

<sup>5</sup> 9 Co. 11; 1 Hale P. C. 50; Plowd. Com. 574. See *supra*, § 92.

Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued: *Quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*; and the stirring of the electuary by Martin, without putting in the poison by Agnes, could not have been the cause of his death. If Martin's trying the electuary was a natural and probable sequence of the prisoner's conduct, then she could properly have been convicted, though certainly not for the reason given by the judges. It makes no matter, however, whether this sequence be long or short. Poison, for instance, is introduced into a reservoir of water. The reservoir freezes, and remains frozen during winter. In the spring the ice melts, and the water flows through a series of channels until it is drunk by a child who is killed. Here there is a continuous natural sequence which, however long, presents an unbroken chain.<sup>1</sup>

§ 389. *Where one person constrains another to take poison.* — Suppose A., in exercise of a moral (as distinguished from physical) power over B., constrains B. to take poison, whereof B. dies, is A. responsible as principal in B.'s murder? If B.'s free agency is at the time extinguished either by terror, or by mental disease, then in such case A. is principal in the first degree.<sup>2</sup> If B.'s free agency is not extinguished, but he voluntarily commits suicide, then A., under the English common law, is indictable as principal in the second degree to B.'s self-murder.<sup>3</sup>

<sup>1</sup> See more fully supra, § 92.

<sup>2</sup> See supra.

<sup>3</sup> Blackburn v. State, 23 Ohio St.

## CHAPTER XIII.

### PROVOCATION AND HOT BLOOD.

Words of reproach no adequate provocation for an assault with intent to kill, § 393.

From what in such cases intent to kill will be inferred, § 394.

When person is touched with apparent insolence, then provocation reduces degree, § 398.

Interchange of blows induced by insulting words, § 399.

A slighter provocation extenuates when intent is only to chastise, § 400.

Husband in hot blood killing adulterer, guilty of manslaughter, § 407.

Same principle to be extended in cases of punishment, when in hot blood, of attacks on the chastity of persons under the rightful protection of defendant, § 412.

Killing to redress a public wrong is murder, § 413.

A bare trespass on property an adequate provocation in cases of unintentional killing, but otherwise when killing is intentional, § 414.

Exercise of a legal right no just provocation, § 417.

Spring-guns illegal when placed on spots where innocent trespassers may wander, § 418.

Trespass on dwelling-house, § 419.

Killing by visitor of master of house not murder if master attempt to expel visitor with undue force, § 420.

Killing a person having legal right to enter room is murder, § 421.

A blow is sufficient provocation when parties are equal, § 422.

In sudden quarrels immaterial who struck the first blow, § 423.

But the blow must have been apparently intended, and naturally calculated to arouse the passions, § 424.

Where there is a disparity in strength or weapons, a cool and deliberate use of such disparity to kill is murder, § 425.

Provocation in such case must be immediate, § 435.

Qualification when the intent is only to chastise, § 436.

Where mortal blow was given after deceased was disarmed or helpless, offence is murder, § 437.

And so where attack was sought by person killing, § 438.

So where revenge is cruel and unusual, § 439.

Murder to kill in gratification of old grudge, § 440.

But continuance of old grudge not to be arbitrarily presumed, § 441.

Malicious killing in another's quarrel is murder; but killing in hot blood is manslaughter, § 444.

In interference by friends, hot blood extenuates in proportion to the nearness of the relationship, § 446.

Restraint or coercion is adequate provocation, § 447.

If there be cooling time, provocation does not extenuate, § 448.

Question of cooling time is for jury, § 449.

Killing in duel is murder, § 463.

And this extends to the seconds, § 467.

§ 393. *Words of reproach no adequate provocation.* — When the evidence shows an intent on the part of the defendant to kill, no words of reproach, no matter how grievous soever, are provocation sufficient to free the party killing from the guilt of mur-

der ; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person.<sup>1</sup>

At the same time it must be remembered that an assault, too slight in itself to be a sufficient provocation, may become such by being coupled with insulting words.<sup>2</sup>

§ 394. *From what in such cases intent to kill will be inferred.* — Hereafter will be generally considered the circumstances from which an intent to kill may be inferred.<sup>3</sup> So far, however, as concerns the topic immediately before us, there are several qualifying considerations which deserve distinctive examination. If A. has a settled intention to kill B., provoking words or gestures by B., at the time of the encounter, are irrelevant to the issue. So on the other hand, if A. has no such prior intention, and a fatal blow is suddenly struck by him, with a weapon he has immediately at hand, upon some stinging insult, then, if there is nothing to prove deliberation on his part, the offence, under our American statutes, cannot be more than murder in the second degree, supposing the insult, though consisting only of words or gestures, to be one naturally calculated to arouse sudden and vehement passion. Then, once more, if, upon such a provocation, A. gives B. a blow the object of which is not to kill or grievously hurt, but only to chastise, the ordinary effect of which blow would be neither death nor grievous hurt, then the offence, should B. die from this blow, would be but manslaughter. Then, again, if on any sudden provocation of a slight nature one person beat another in a cruel and unusual manner, so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him.<sup>4</sup> Hence, it may not be unsuitable at this place to notice some of the cases in which this question of

<sup>1</sup> 1 Hale P. C. 456; Foster, 290; U. S. v. Wiltberger, 3 Wash. C. C. R. 515; U. S. v. Travers, per Story, J., 2 Wheeler's C. C. 504; Com. v. York, 9 Metcalf, 93; R. v. Campbell, 4 Boston Law Rep. 181; State v. Tackett, 1 Hawks, 210; State v. Merrill, 2 Dever. 269; Ray v. State, 15 Georgia, 223; Malone v. State, 49 Ga. 210; Rapp v. State, 14 B. Monroe, 614; People v. Freeland, 6 Cal. 96; State v. Starr, 38 Missouri, 270; Preston v.

State, 25 Mississ. 383; Williams v. State, 3 Heisk. 376; People v. Butler, 8 Cal. 435; State v. Shippey, 10 Minnes. 223; Martin v. People, 30 Wisc. 216; Johnson v. State, 27 Texas, 758; State v. Anderson, 4 Nev. 265; Taylor v. State, 48 Ala. 180. See qualifications of this stated in R. v. Rothwell, 12 Cox C. C. 145.

<sup>2</sup> R. v. Smith, 4 F. & F. 1066.

<sup>3</sup> See infra, § 671.

<sup>4</sup> 1 East, 235.

intent, when the provocation consisted only of words or gestures, has been scanned.

§ 395. A woman called a man, who was sitting drinking in an alehouse, "*a son of a whore*," upon which the man took up a broom-staff, and at a distance threw it at her and killed her; and it was propounded to the judges whether this was murder or manslaughter. Two questions were made: 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter; 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so unlikely to cause death, would not alter the case. The judges were not unanimous upon this case; and it was advised that the king should be moved to pardon the offender; which was accordingly done.<sup>1</sup> No doubt the case, were it now to be adjudged, would be held one of manslaughter, from the comparatively innocuous character of the instrument used. On the other hand, where a husband, being scolded by his wife, struck her with a pestle, giving her, by the great force of the blow, a wound of which she instantly died, this was properly held murder.<sup>2</sup>

§ 396. Where a boy twelve years old, who had been in the habit of going to a cooper's shop, and taking away chips, was told one morning by the cooper's apprentice not to come again, he, however, went again in the afternoon, and the apprentice spread his arms out to prevent his reaching the spot where he usually gathered the chips, on which the boy started off, and in passing a work bench took up a whittle (a sharp pointed steel knife with a long handle) and threw it at the apprentice, and the blade of the whittle entered his body, to the depth of four inches, and caused his death; the jury having found him guilty upon an indictment for manslaughter; Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge.<sup>3</sup>

§ 397. A charge, "that although in general mere words might not be sufficient to reduce the crime of murder to manslaughter, yet the jury were the judges whether the provocation, if more

<sup>1</sup> 1 Hale, 455.

<sup>2</sup> Langstaff's case, 1 Lewin, 162.

<sup>3</sup> 1 Russ. on Cr. 514.

than by mere words, was sufficient," should be refused as calculated to mislead the jury ; because it leaves them to infer that mere words may in some cases thus reduce the offence ; because it assumes that it is not the province of the court, but of the jury, to pass upon the legal sufficiency of the provocation ; because there being uncontradicted evidence of express malice, no degree of provocation could extenuate the offence, and the charge in that view of the case was inapplicable to the fact.<sup>1</sup> And as a general rule under such circumstances, it is proper to instruct the jury that they must take into consideration the weapon used, as well as the degree of deliberation, as important ingredients in the question how far the provocation sufficed.

§ 398. *When the person is touched, then provocation reduces degree.* — The moment, however, the person of the defendant is touched with apparent insolence, then the provocation is one which, ordinarily speaking, reduces the offence to manslaughter. Thus it has been held that if A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B., this is murder ; but if B. had jostled A., this jostling, if made with such apparent insolence as to provoke a quarrel, and if hastily resented by A., in hot blood, reduces the grade to manslaughter.<sup>2</sup>

*A fortiori*, where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis*, occasioned by the provocation. And so it was considered that where A. riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter.<sup>3</sup>

§ 399. *Interchange of blows induced by insulting words.* — Though words of slighting, disdain, or contumely will not of themselves make such a provocation as to lessen the crime into manslaughter ; yet it seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., that this is but manslaughter.

<sup>1</sup> *Felix v. The State*, 18 Ala. 72.

<sup>2</sup> Kel. 135 ; 1 Hale, 455.

<sup>3</sup> 1 Hale, 455 ; *infra*, § 424.

ter. The stroke by A. was deemed a new provocation, and the conflict a sudden falling out; and on those grounds the killing was considered as only manslaughter.<sup>1</sup>

§ 400. *A slighter provocation extenuates when intent is only to chastise.*—A large class of cases occur in practice where slight provocations, as has been already incidentally noticed, have been considered as extenuating the guilt of homicide, upon the ground, that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life.<sup>2</sup> Thus, where it appeared that the prisoner, having employed her step-daughter, a child of ten years old, to reel some yarn, and finding some of the skeins knotted threw at the child a *four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also shown that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered of great difficulty, and no opinion was ever delivered by the judges. The doubt appears to have been principally upon the question, whether the instrument was such as would probably, at the given distance, have occasioned death or great bodily harm.<sup>3</sup>

One Freeman, a soldier, was in a public house drinking, and asked a girl who was sitting there to drink with him; upon which one Ann Simpson, with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. Freeman then caught the pot from her and struck her twice on the head with it; the blood gushed out, and she was taken to a hospital where the wound was examined, and did not appear dangerous, being about a quarter of an inch deep; but it produced an erysipelas which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the

<sup>1</sup> 1 Hale, 455; infra, § 423.

v. Roberts, Ibid. 349; Com. v. Green,

<sup>2</sup> Fost. 291; 4 Black. Com. 200; 1 Ashmead, 289.

State v. Tackett, 1 Hawks, 210; State

<sup>3</sup> Hazel's case, 1 Leach, 368; 1 East P. C. 236.

prisoner intended to do the woman any grievous bodily harm. Gibbs, C. B., told the jury that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered; that the aggravation, though not constituting a provocation which would extenuate the giving a deadly blow, would palliate the giving a moderate blow; and he left it to the jury whether those blows were of a character likely to cause death. The jury finding in the negative, the defendant was convicted of manslaughter only.<sup>1</sup>

§ 401. On an indictment for wounding with a tin can, with which the prisoner had struck the prosecutor four times on the head, Alderson, B., directed the jury to consider: "Whether the instrument employed was, in its ordinary use, likely to cause death; or, though an instrument unlikely under ordinary circumstances to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise? A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head with it, you will say, whether he did this merely to hurt the prosecutor, and give him pain, as by giving him a black eye or bloody nose, or whether he did it to do him some substantial grievous bodily harm. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest; but where an instrument like the present is used, you must consider whether the mode in which it was used satisfactorily shows that the prisoner intended to inflict some serious or grievous bodily harm with it."<sup>2</sup>

Where the prisoner, who was a butcher, had employed a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died: Nares, J., told the jury to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his

<sup>1</sup> R. v. Freeman, 1 Russ. on Cr. &    <sup>2</sup> R. v. Howlett, 7 C. & P. 274.  
M. 518.



passion was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy; and that if they thought the stake was an improper instrument, they should further consider whether it was probable that it was used with an intent to kill; if they thought it was, that they must find the prisoner guilty of murder; but, on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount at most to manslaughter. The jury found it manslaughter.<sup>1</sup>

§ 402. So, in the case already noticed where a man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff and threw it at her from a distance, and killed her. In this case, as will be remembered, a pardon was advised; and the doubt appears to have arisen upon the ground, that the instrument was not such as could probably, at the given distance, have occasioned death or great bodily harm.<sup>2</sup>

§ 403. A master having struck his servant, who was a lad, with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life.<sup>3</sup>

§ 404. The keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail and beat him, upon which the horse running away, the boy was killed. It was said, that if the chastisement had been more moderate, it had been but manslaughter;<sup>4</sup> but on the evidence, the offence was murder, since death, through a process so cruel and dangerous, was ground from which malice could be inferred.<sup>5</sup>

§ 405. Where A., finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him, it was holden to be manslaughter; but it must be understood that he beat him, not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again.<sup>6</sup>

<sup>1</sup> Wigg's case, 1 Leach, 378.

Hale, 434; 1 East P. C. c. 5, s. 22, p. 239.

<sup>2</sup> 1 Hale, 455, 456.

<sup>3</sup> Turner's case, Comb. 407; 1 Ld.

<sup>5</sup> See *infra*, § 439.

Raym. 143; 2 Sid. 1498.

<sup>6</sup> Fost. 291; 1 Hale, 478.

<sup>4</sup> Hallaway's case, Cro. Car. 131; 1

§ 406. The prisoner's son having fought with another boy and been beaten, ran home to his father all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died. The case was held to be manslaughter, on the ostensible ground of hot blood, but the authority is only supportable on the ground that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue.<sup>1</sup> Yet such a palliation would not be allowed if the punishment was deliberately cruel.<sup>2</sup> And hence in Virginia, where a man who had whipped a boy very severely was the next day killed by the boy's father, who fell on him and beat him violently, cruelly, and continuously with his fists, the killing was held murder.<sup>3</sup>

§ 407. *Husband in hot blood killing adulterer, guilty of manslaughter.* — Whether a homicide committed by a man smarting under a sense of dishonor is murder or manslaughter, depends upon the question whether the killing was in the first transport of passion or not. In the latter case the offence is murder; in the former, manslaughter. Thus, where a man finds another in the act of adultery with his wife, and kills him or her<sup>4</sup> in the first transport of passion, he is only guilty of manslaughter, and that of a nature entitled to the lowest degree of punishment,<sup>5</sup> for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But it has been already shown that the killing of an adulterer deliberately, and upon revenge, would be murder.<sup>6</sup> And evidence of the adultery is

<sup>1</sup> Rowley's case, 1 Hale, 453; Fost. 294, 295. See comments, *infra*, § 439.

<sup>2</sup> *Infra*, § 439.

<sup>3</sup> *Com. v. McWhirt*, 3 Grat. 594.

<sup>4</sup> *Pearson's case*, 2 Lew. 216.

<sup>5</sup> *Manning's case*, 1 Ventr. 212; *Raym.* 212; *People v. Horton*, 4 Mich. 83; *State v. John*, 8 Ired. 330; *State v. Samuel*, 3 Jones (N. C.) Law, 74; *State v. Neville*, 6 Jones (N. C.) Law, 433; *Maher v. People*, 10 Mich. 212; *Com. v. Whittier*, 2 Brewst. 388. See *People v. Cole*, Cent. Law J. July 30, 1874.

<sup>6</sup> 1 Russell on Crimes, 525; *R. v.*

*Fisher*, 8 Car. & P. 182; *State v. Holme*, 54 Mo. 153; *State v. Samuel*, 3 Jones (N. C.) Law, 74; *State v. Avery*, 64 N. C. 608. "When a husband only hears of the adultery of his wife, no matter how well authenticated the information may be, or how much credence he may give the informer, and kills either the wife or her paramour, he does it not upon present provocation, but for a past wrong — a grievous one indeed; but it is evident he kills for revenge. Let it be considered how it would be if the law were otherwise. How remote or re-

only admissible when the time of the husband's discovery of it is brought so near to the homicide as not to allow space for cooling.<sup>1</sup>

§ 408. It was therefore rightly held by the supreme court of Indiana, in 1871, that it is incompetent for the defendant to prove that for a long time he had been cognizant of the adulterous intercourse of his wife with the deceased.<sup>2</sup> "If," said the court, "he had been thus for a long time apprised of her guilt in that respect, there had been an abundance of time for the ebullition of passion which might be supposed to arise on being first apprised of the fact, to subside. . . . It is sufficient to say that if the facts offered to be proven were established, they would in no way excuse or mitigate the offence."<sup>3</sup> It is, however, admissible for the defendant to prove a conspiracy of late date to carry off the defendant's wife, which had only come to defendant's notice immediately before the homicide, the deceased being concerned in the conspiracy.<sup>4</sup>

§ 409. In a case tried before Mr. Baron Rolfe, in 1848, it appeared that the prisoner, who was a soldier in the 14th Regiment of Foot, was cohabiting with the deceased, and that on the 26th of May, the prisoner being confined to the barracks at Newport for drunkenness, the deceased came to him and asked him for money, when he gave her half a crown. Immediately after this the prisoner watched the deceased, and saw her go to the canteen of the barracks, and there drink with another soldier named Dogherty, upon which the prisoner went to his room in the barracks, and having got a cartridge from a pouch and loaded his musket he went to the barrack yard, and there meet-

cent must the offence be? How long or how far may the husband pursue the offender? If it happen that he be the deluded victim of an Iago, and, after all, that he has a chaste wife, how is it to be then? These inquiries suggest the impossibility of acting on any rule but that of the common law, without danger of imbruing men's hands in innocent blood, and certainly of encouraging proud, heady men to slay others for vengeance, instead of bringing them to trial and punishment by law. It is obvious that these observations apply with equal force to

an alleged rape, or an attempt to commit a rape on a wife at a past time; and this case furnishes a forcible illustration of the extreme hazard of extenuating the offence of taking the life of a fellow-man upon information." Ruffin, C. J., *State v. Neville*, 6 Jones (N. C.) Law, 433, 434.

<sup>1</sup> *Biggs v. State*, 29 Geor. 725.

<sup>2</sup> *Sawyer v. State*, 35 Ind. 80 (1871).

<sup>3</sup> See also *State v. Samuel*, 3 Jones N. C. 74; *State v. John*, 8 Ired. 330.

<sup>4</sup> *Cheek v. State*, 35 Ind. 492.

ing the deceased, he shot her, and she instantly died. It was not quite clear on the evidence whether the prisoner loaded the musket immediately after he took the cartridge from his pouch, or whether he left the room and returned to it after taking the cartridge, and before loading the musket. Keating, for the prisoner, in addressing the jury submitted that these facts did not necessarily lead to the conclusion that the prisoner had committed the act with malice aforethought, but that the jury might be justified in convicting the prisoner of the crime of manslaughter only. The prisoner was, no doubt, strongly attached to the unfortunate woman whose life had been sacrificed, and the whole case might be summed up in a few words. It was the result of a strong feeling of affection, not the less strong because illicit, excited to jealousy, goaded to frenzy, and terminating in crime. But in the prisoner's conduct there was no trace of that premeditation, that malice aforethought, as the law aptly expressed it, which was the characteristic of murder ; and therefore he trusted that the jury would acquit the prisoner of the crime of wilful murder, and find him guilty of manslaughter only. Rolfe, B. (in summing up) : " It is perfectly true that the unlawful taking away of life may amount to the crime of murder or the crime of manslaughter ; but with respect to the circumstances which reduce the crime of murder to that of manslaughter I shall make a few observations, differing, as I do entirely, from the observations of the prisoner's counsel. *Prima facie*, when any man takes away the life of another, the law presumes that he did it of malice aforethought, unless there be evidence to show the contrary. Such are the cases where there has been a quarrel, a fight, or dispute, and in the violence of such quarrel, fight, or dispute death has ensued. Undoubtedly we find other cases stated, and among them the case of adultery. It is said that if a man were to find his wife in the act of committing adultery, and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder : however strongly you may suspect it, it would most unquestionably be murder ; and if I were to direct you, or you were to find other-

wise, I am bound to tell you, either I or you would be grievously swerving from our duty. I state that without the least shadow of doubt. We must not shut our eyes to the truth." [The judge here stated the facts as proved, observing that he thought it very immaterial as to the length of time that elapsed between the time when the prisoner saw the deceased and Dogherty together, and the time when he fired the shot, and equally little material whether the prisoner took the cartridge out of the pouch at the same time when he loaded the musket, or left the room between the one and the other, and concluded]: "In point of law there is nothing here to reduce the crime of murder to the crime of manslaughter. The only suggestion is, that the prisoner did it because he had conceived a jealousy of the woman; even if that was so, it would not reduce the crime to manslaughter."<sup>1</sup>

§ 410. In a famous case tried in Philadelphia, in 1816, the deceased, after being married for some years, left the country; and A., his wife, not hearing from him for two years, married the defendant, acting under a Pennsylvania statute, which provided that persons so marrying should not be indictable for adultery, although, as it was afterwards held, the second marriage was not in other respects valid. The deceased returned, after a lapse of a year from the second marriage, and found A. living with the defendant, upon which a quarrel arose, which was partially composed, but which ended in the defendant deliberately shooting the deceased at the house of A. This was held murder in the first degree.<sup>2</sup>

But the propriety of this ruling has since been gravely questioned, on the ground that Judge Rush, who presided, charged that no prior intention to kill was necessary to murder in the first degree.<sup>3</sup> Another ground for exception is, that as the defendant acted under legal advice (mistaken though it was) that his marriage was valid, and that as he therefore, according to his own view, was at the time of the conflict maintaining his own rights in his own house, the malice necessary to constitute murder in the first degree was not imputable to him.

<sup>1</sup> *R. v. Kelly*, 2 Car. & Kir. 814.  
So also *State v. Holme*, 54 Mo. 153.

<sup>2</sup> See comments of Ch. J. Agnew, in *Jones v. Com.*, given *infra*, § 584.

<sup>3</sup> *Com. v. Smith*, 7 Smith's Law, App. 2; *Wheeler C. C.* 80.

§ 411. A husband suspecting his wife of an adulterous intercourse with A., employed B. to watch them. While so employed B. killed A. It was held, that testimony that A. had committed adultery with the wife was not relevant in the trial of B. for the murder of A., whatever might have been the law if the husband had killed him.<sup>1</sup>

§ 412. *Same principle to be extended to cases of punishment, when in hot blood, of attacks on the chastity of persons under the rightful protection of the defendant.*—A man cannot, indeed, thus avenge the adultery of his paramour,<sup>2</sup> for the connection is not merely unauthorized by law but in defiance of law. But where there is a legal right and natural duty to protect, there an assault on the chastity of the ward (using this term in its largest sense) will be a sufficient provocation to make hot blood thus caused an element which will reduce the grade to manslaughter. That this is the law when a father is incensed at an unnatural offence attempted on his son, and acts in hot blood, is conceded.<sup>3</sup> There is no sound reason why a similar allowance should not be made for a father's or a brother's indignation at a sexual outrage attempted on a daughter or a sister. To impose a severer rule would be a departure from the analogies of the law, and would bring the court in conflict not only with the jury, who under such circumstances never would convict of murder, but with the common sense of the community. Supposing the injury to female chastity to be avenged in hot blood by a brother, a father, or other person having a right to protect the person injured, the offence is but manslaughter.<sup>4</sup>

<sup>1</sup> *People v. Horton*, 4 Mich. 67.

<sup>2</sup> *Parker v. State*, 31 Texas, 132.

<sup>3</sup> *R. v. Fisher*, 8 C. & P. 182.

<sup>4</sup> See *infra*, § 539. See on this point remarks of Blackburn, J., *infra*, § 446; and also the following remarks by Lord Macaulay, in his Report on the Indian Penal Code:—

“One outrage which wounds only the honor and the affections is admitted by Mr. Livingston to be an adequate provocation. ‘A discovery of the wife of the accused in the act of adultery with the person killed is an adequate cause.’ The law of France,

the law of England, and the Moham-  
medan law are also indulgent to homicide committed under such circumstances. We must own that we can see no reason for making a distinction between this provocation and many other provocations of the same kind. We cannot consent to lay it down as an universal rule that in all cases this provocation shall be considered as an adequate provocation. Circumstances may easily be conceived which would satisfy a court that a husband had in such a case acted from no feeling of wounded honor or affection, but from

§ 413. *Killing to redress a public wrong is murder.*—Persons laboring under a sense of wrongs, public or private, real or supposed, must apply to the law for redress. If there is opportunity to apply for such redress, he who supposes himself aggrieved is guilty of a criminal offence if he undertakes to inflict violent punishment; and he is guilty of murder if he deliberately and coolly kills the person by whom he supposes himself aggrieved.<sup>1</sup> In the highest of all injuries, that of adultery, this, as we have just seen, is the law; and *a fortiori* must this rule be applied in cases of injuries less crushing. That such grievances exist constitutes a defence that will not, as a bar to the indictment, be received by the court. Thus on an indictment against a convict for the homicide of his keeper, evidence was properly held, by the supreme court of Connecticut, in 1870, to be inadmissible for the purpose of showing that the food supplied by the deceased to the defendant was tainted and unwholesome.<sup>2</sup>

So a supposed public grievance will not excuse a riot undertaken for its removal;<sup>3</sup> though, as has been seen, the excitement and tumult produced by a movement of this class may be put in evidence for the purpose of showing such a confusion of mind as

mere brutality of nature, or from disappointed cupidity. On the other hand, we conceive that there are many cases in which as much indulgence is due to the excited feelings of a father or brother as to those of a husband. That a worthless, unfaithful, and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother should be guilty of murder for killing, in a paroxysm of rage, the seducer of his sister, appears to us inconsistent and unreasonable.

"There is another class of provocations which Mr. Livingston does not allow to be adequate in law, but which have been, and while human nature remains unaltered, will be, adequate in fact to produce the most tremendous effects. Suppose a person to take indecent liberties with a modest female, in the presence of her father,

her brother, her husband, or her lover. Such an assault might have no tendency to cause pain or danger; yet history tells us what effects have followed from such assaults. Such an assault produced the Sicilian Vespers.<sup>4</sup> Such an assault called forth the memorable blow of Wat Tyler.

"It is difficult to conceive any class of cases in which the intemperance of anger ought to be treated with greater lenity. So far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter."

<sup>1</sup> See *supra*, § 204.

<sup>2</sup> *State v. Wilson*, 38 Connect. 126. See also *Territory v. Drennan*, 1 Montana, 41.

<sup>3</sup> *Supra*, § 200-204.

prevented the participants from entertaining a deliberate design to take life.<sup>1</sup>

§ 414. *A bare trespass on property an adequate provocation, in cases of unintentional killing, but otherwise when killing is intentional.* — A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence, and if he do, and with it kill the trespasser, it will be murder, and this, though killing were actually necessary to prevent the trespass.<sup>2</sup> On the other hand, if the object of the violence is to drive off the trespasser, or even to chastise him, and no blows likely to produce grievous bodily harm are inflicted, the offence, if death ensue, is but manslaughter. Thus in an old case, A. finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him; this was holden to be manslaughter. To extenuate the offence, in such case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and deter the offender from repeating the like, and it must so appear. For if A. had knocked out the brains of the deceased with a bill or hedge-stake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it would have been murder.<sup>3</sup>

So in a case already noticed, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him. The horse ran away, and dragged the boy on the ground till his shoulder was broken, whereof he died. The killing was ruled murder, it being held to be not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savored of cruelty. But if the chastisement had been more moderate, it had been but manslaughter. For it was argued that between persons nearly connected together by civil or natural ties, the law admits the force of a provocation done to one to be felt by the other; and, therefore, if in such cases the owner or master himself had caught the trespasser and beat him

<sup>1</sup> See *supra*, § 190.

*Ala.* 588; *State v. Shippey*, 10 *Minn.*

<sup>2</sup> *R. v. Scully*, 1 C. & P. 319; *Com.* 223.

*v. Drew*, 4 *Mass.* 391; *State v. Mor-*

<sup>3</sup> *Fost.* 291; 1 *Hale*, 473; *Hawk. c.*

*gan*, 3 *Iredell*, 186; *M'Daniel v. State*,

31, s. 34; *Kel.* 132.

8 *S. & M.* 401; *Oliver v. State*, 17



in such a manner as showed a desire only to chastise and prevent a repetition of the offence, but had unfortunately and against his intent killed him, it would only have been manslaughter.<sup>1</sup>

§ 415. Where a person, whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given.<sup>2</sup>

§ 416. The defendant, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person, who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died; being indicted for murder, the defendant was found guilty and executed.<sup>3</sup>

§ 417. *Exercise of a legal right no just provocation.*—It should be remembered that the mere exercise of a legal right, no matter how offensive, is no such provocation as lowers the grade of homicide.<sup>4</sup>

§ 418. *Spring-guns illegal when placed on spots where innocent trespassers may wander.*—A landowner has no right to plant in it spring-guns by which ordinary trespassers may be wounded, and if he does so, and death ensues, he is responsible for the consequences.<sup>5</sup> His civil liability for injuries thus inflicted may be appealed to as illustrating the position here laid down. That such liability exists, cannot be questioned. Hence, in an English case,<sup>6</sup> the defendant for the protection of his property, some of

<sup>1</sup> Hallaway's case, Cro. Car. 131; sell v. Smyth, 7 C. B. N. S. 731; Hardcastle v. South Yorkshire R. C. 4 H. & N. 67.

<sup>2</sup> Fray's case, 1 Hawk. c. 31, s. 42; compare Stone v. Jackson, 16 C. B. 199; Holmes v. North Eastern R. C. L. R. 4 Ex. 254; Indermaur v. Dames, L. R. 1 C. P. 274; R. R. v. Stout, 17 Wall. 657.

<sup>3</sup> R. v. Price, 7 C. & P. 178.

<sup>4</sup> See State v. Craton, 6 Ired. 164; State v. Lawry, 4 Nev. 161; R. v. Longden, R. & R. C. C. 228.

<sup>5</sup> Infra, § 553; State v. Moore, 31 Conn. 479; Barnes v. Ward, 9 C. B. 392, 420; In re Williams v. Groucott, 4 B. & S. 149, 157; Binks v. South Yorkshire R. C. 3 B. & S. 244; Houn-

<sup>6</sup> Bird v. Holbrook, Bing. 628, cited 1 Q. B. 37; Wooton v. Dawkins, 2 C. B. N. S. 412. See also Judgm., Mayor of Colchester v. Brooks, 7 Q. B. 339.

which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot, and seriously injured, the defendant was held liable in damages.<sup>1</sup> It is true, that in a subsequent case, as is noticed elsewhere, this decision is doubted, because it proceeded on the ground, that setting spring-guns without notice was, independently of the statute then in force, an unlawful act; but it was likewise remarked that, although the correctness of such a proposition might perhaps be questioned, yet if it were sound, the above ruling was correct.<sup>2</sup> It is clear that no man has a right to place on his land any instruments the effect of which may be to injure persons merely straying on such land. If such weapons are erected inconsiderately, the killing of a mere heedless trespasser on an open country is manslaughter; if the weapons are erected maliciously, the offence is murder. But if the weapons are erected at the door of a place where valuables are kept, and to which in the ordinary course of things none but a burglar would penetrate, then the killing is excusable.<sup>3</sup>

§ 419. *Trespass on dwelling-house.* — The law of self-defence, in this respect, is discussed in future sections; <sup>4</sup> at present we may state the following propositions: —

1. For the master of a house to kill, in cool blood, a person seeking entrance into a house, is murder, unless the person killing, according to his own lights, honestly, and without negligence, believes that the person entering the house is attempting to perpetrate a felony, and that killing is the only way to prevent the felony; in which case there should be an acquittal.

2. For the master of a house to kill, in hot blood, a person forcing his way into the house, is manslaughter, unless the person killing, according to his own lights, honestly believes that the person entering the house is seeking to perpetrate a felony, and that killing is the only way to prevent the felony; in which case there should be an acquittal.

3. When a person in danger of his life takes refuge in his own

<sup>1</sup> Bird v. Holbrook, 4 Bing. 628.

<sup>2</sup> Judgm., Jordin v. Crump, 8 M. & W. 789, where the court agree in opinion with Gibbs, C. J., in Deane v. Clayton, 7 Taunt. 489, which was an

action for killing plaintiff's dog by a spike placed on defendant's land for the preservation of his game.

<sup>3</sup> See infra, § 553.

<sup>4</sup> See infra, § 552-3.

house, then, the attack being unlawful, he is excused in taking his assailant's life; and he may assemble his friends for the same purpose, who stand, as to this defence, in the same position as himself.<sup>1</sup>

§ 420. *Killing of master of house.* — As a man has a right to

<sup>1</sup> As authority for these points, see *infra*, § 552, 553, and *Com. v. Clarke*, 2 Metc. 23; *State v. Martin*, 30 Wisc. 216; *McCoy v. State*, 3 Eng. (Ark.) 451; *State v. Ross*, 2 Dutcher, 226; *People v. Caryl*, 3 Parker C. R. 234; *Grechia v. People*, 53 Ill. 295; *Harrington v. People*, 45 Barb. 262; *State v. Patterson*, 45 Vt. 308; *State v. Lazarus*, 1 Const. C. R. 34; *Territory v. Drennan*, 1 Mont. 41; *Pond v. People*, 8 Mich. 150; *Patten v. People*, 18 Mich. 314; *Carroll v. State*, 23 Ala. 28; *Lyon v. State*, 22 Ga. 397; *Hinton v. State*, 24 Tex. 454; and *infra*, § 540 *et seq.* See also an article in *Albany Law J.* for October 14, 1874.

The resolution of the judges in *Semayne's case*, 5 Coke, 91, was: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of a man is a thing precious and favored in law, so that although a man kills another in his defence, or kills one *per infortun*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing and therewith agree. So it was held in H. 7, 39, every one may assemble his friends and neighbors to defend his house against violence; and the reason of all this is, because *Domus sua cuique est tutissimum refugium.*"

Lord Hale says: "A. is in possession of the house of B. B. endeavors to enter upon him. A. can neither justify the assault or the beating of B., for B. had the right of entry into the house; but if A. be in possession of a house, and B., as a trespasser, enter without title upon him, A. may not beat him, but may quietly lay hands upon him to put him out, and if B. resists and assaults A., then A. may justify the beating of him as of his own assault. But if A. kills him in defence of his house, it is neither justifiable nor within the privilege *se defendendo*, for he entered as a trespasser, and, therefore, it is, at least, common manslaughter," and he cites *Harcourt's case* in support of this, who, "being in possession of a house, A. endeavored to enter, and shot an arrow at those who have entered, and killed one of the company, which was ruled manslaughter, and not *se defendendo*, because there was no danger to his life from those without." 1 Hale's P. C. 485-6.

Hawkins says: "Neither can a man justify the killing of another in defence of his house or goods, or even of his person, from a bare private trespass, and, therefore, he that kills another who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he was forbidden, is guilty of manslaughter." Hawkins, 83. Cited from *Albany L. J.*, *ut supra*, and see fully *infra*, § 552.

order another to leave his house, but has no right to put him out by force until gentle means fail; if he attempt to use violence in the onset and is slain, it will not be murder in the slayer, if there is no previous malice.<sup>1</sup>

§ 421. *Killing a person having a legal right to the use of a room is murder.* — If A. stands with a weapon in the doorway of a room, wrongfully to prevent B. from leaving it, and others from entering, and C. who has a right to the room struggles with A. to get his weapon from him, upon which D., a comrade of A., stabs C., this is murder in D. if C. dies.<sup>2</sup>

§ 422. *Where the parties are equal, a blow is sufficient provocation.* — Any assault, in general, made with violence or circumstances of indignity upon a man's person, by one not greatly his inferior in strength, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manslaughter.<sup>3</sup>

§ 423. *In sudden quarrels, immaterial who struck the first blow.* — In a sudden and equal quarrel, when both parties strike in the heat of blood, it is immaterial by whom the first blow is struck.<sup>4</sup> Thus, if A. uses provoking language or behavior towards B., and B. strikes him, upon which a combat ensues, in which A. is killed, this is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow.<sup>5</sup>

The deceased, who was a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gaming, and was chastised by some of the party for his conduct, and a clamor was raised against him. As he passed the prisoner, who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his doubled fist in the face, and one blow

<sup>1</sup> McCoy v. State, 3 English (Ark.), Snow, 1 Leach C. C. 151; R. v. Rankin, R. & R. C. C. 43; Allen v. State, 5 Yerger, 483; supra, § 395, and cases hereafter cited.

<sup>2</sup> R. v. Longden, R. & R. C. C. 228.

<sup>3</sup> R. v. Thomas, 7 C. & P. 817; R. v. Taylor, 2 Lew. C. C. 217; R. v.

<sup>4</sup> Supra, § 399.

<sup>5</sup> Post. 295; 1 Hale, 456.

in the eye ; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly ; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face ; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by the heat of blood ; but the learned judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the judges were of opinion that it was only a case of manslaughter.<sup>1</sup>

§ 424. *But the assault must have been apparently intended, and naturally calculated to arouse the passions.*—An unintentional and trivial assault is no palliation. Thus, in a case in South Carolina, where it was argued by the defendant's counsel that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, the position was said to be equally unsupported by proof, and unavailing if true. “In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon another in the dark would not authorize such a murderous attack upon him. Such an act of itself would be a sure indication of a depraved and wicked heart, void of all social duty, and fatally bent on mischief.”<sup>2</sup>

§ 425. *Where there is a disparity in strength or weapons, a cool and deliberate use of such disparity to kill is murder.*—Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault ; nor in all cases even by a blow.<sup>3</sup> Violent acts of resentment, bearing no proportion to the provocation or insult,

<sup>1</sup> R. v. Ayes, R. & R. 166.

<sup>2</sup> R. v. Lynch, 5 C. & P. 324.

<sup>3</sup> State v. Tooky, 2 Rice's Digest,

104. See *supra*, § 398.

particularly where there is a decided preponderance of strength on the part of the party killing, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often imply malice.<sup>1</sup>

The same remark applies to the case already cited, where the keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail and beat him, upon which the horse running away, the boy was killed; the case being held murder.<sup>2</sup>

§ 426. There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was *murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner*, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the attack.<sup>3</sup>

But even on this evidence, as it thus stands, the case has, been very much doubted. Thus, in Pennsylvania, Gibson, C. J., said: "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Under this view of the law I have always doubted Stedman's case."<sup>4</sup>

§ 427. Much doubt, also, has been expressed, as we have already seen, as to the following case: Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the

<sup>1</sup> Keater's case, Comb. 408.

<sup>2</sup> Stedman's case, Fost. 292.

<sup>3</sup> Supra, § 414.

<sup>4</sup> Com. v. Mosler, 4 Barr, 268.

attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which Lutterel refused to give; and he went up-stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying: "He did not intend to hurt the officers; but he would not be ill-used." The officer who had been sent for the attorney's bill soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him: one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter *by reason of the first assault with a cane*.<sup>1</sup> Mr. Justice Foster, viewing the case as thus reported, is surprised "that all these circumstances of aggravation,—two to one, he helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol,—that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane." The case, however, is explained by the fact, heretofore noticed, that Lutterel was killed when resisting an arrest.<sup>2</sup>

§ 428. Where a disparity exists as to means of attack and defence, the party who takes life by means of such disparity cannot defend himself on the ground of provocation if unfair advantage was taken, or if the weapon was used otherwise than in sudden passion.<sup>3</sup> Thus if B., in a case cited in a preceding section, had drawn his sword, and made a pass at A., the sword of A. being then undrawn, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed; this would have been murder, inasmuch as B., by making the pass, his adversary's sword being undrawn, showed that he sought his blood. And A.'s endeavor to defend himself, which he had a right to do, will not excuse B.; but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more

<sup>1</sup> R. v. Tranter, 1 Stra. 49; supra, § 212.

<sup>2</sup> Supra, § 212.

<sup>3</sup> State v. Hildreth, 9 Iredell, 429.

than manslaughter,<sup>1</sup> yet if, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter.<sup>2</sup> The following cases were upon this point.

The prisoner, whose name was William Snow, and who was a shoemaker, lived in the same neighborhood as the deceased, and at no great distance from him. On the afternoon of the day mentioned in the indictment, the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house, and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning, in his way home, by the prisoner's house; and on passing the prisoner, as he sat on the bench, the deceased called out to him, "Are not you an aggravating rascal?" The prisoner replied: "What will you be, when you are got from your master's feet?" On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cart-way. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, "You rogue, what do you do with that knife in your hand?" and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, "The rogue has stabbed me to the heart; I am a dead man;"

<sup>1</sup> 1 Hawk. P. C. c. 31, s. 28; Fost. 295.

<sup>2</sup> 1 East P. C. c. 5, s. 26, p. 243.



and expired. Upon inspection, it appeared that he had received three wounds: one very small, on the right breast; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on the left breast. After much consideration, the judges determined that the offence was only manslaughter.<sup>1</sup>

§ 429. Mr. East tells us that the judges thought in this case that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that color, to revenge his former quarrel, by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, neither provoked him by word nor gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders; though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the judges thought that the offence only amounted to manslaughter; and the prisoner was recommended for a pardon.<sup>2</sup>

§ 430. Upon an indictment for maliciously cutting, it appeared that the prisoner had cut the prosecutor in a fight that took place between them, but no instrument was seen either before or at the time in the prisoner's hands. Bayley, J.: "When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effects charged in the indictment, and with the instrument ready in his hand, in order that he might

<sup>1</sup> R. v. Snow, 1 Leach, 151.

<sup>2</sup> Ibid.

resort to it with any of the alleged intents, then he is guilty. For if death had ensued it would have been murder.”<sup>1</sup>

§ 481. If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter.<sup>2</sup> But if a party, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon ; or if at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon ; the killing in both these cases will be murder. The prisoner and Levy quarrelled and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places ; and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner, who had a clasped knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning, or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder ; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder.<sup>3</sup>

§ 482. John Taylor, a Scotch soldier, and two other Scotchmen were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist : the servant who was struck went out of the room into the yard, to fetch his fellow-servants to turn Taylor and his company out of the room ; and in the mean time, an

<sup>1</sup> Whiteley's case, 1 Lew. 173.

State v. Ramsay, 5 Jones N. C. 195 ;

<sup>2</sup> R. v. Anderson, 1 Russ. C. & M. Preston v. State, 25 Missis. 383.

731 ; R. v. Kessal, 1 C. & P. 437 ;

<sup>3</sup> R. v. Anderson, 1 Russ. on Cr. 731.

altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor, and go out of the house; and Taylor, after some further altercation, was going away, when the deceased laid hold of him by the collar, and said, "he should not go away till he had paid for the liquor;" and then threw him down against a settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage; and Taylor then said, "he did not mind killing an Englishman more than eating a mess of crowdy." The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse; whereupon Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter.<sup>1</sup>

§ 433. The prisoner, who had shortly before been discharged from the Coldstream Guards, went to a public house in company with his brother and another person; there were two more soldiers in the house, and the deceased was sitting with them; a dispute arose about paying the reckoning, and a fight took place between the prisoner and one Burrows; in the scuffle B. fell down by the fireplace on his knees, and the deceased jumped over the table and struck the prisoner; the deceased was turned out by the landlord, but admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out; the deceased remained about a quarter of an hour after the prisoner and then left; the prisoner and the deceased were both in liquor; the deceased tried to get out directly after the prisoner left, but was detained by the persons in the room; as soon as they let him go he jumped over the table, and went out of the house, saying as he went, that if he caught them he would serve them out: the deceased was a person who boasted of his powers as a fighter; the deceased followed the prisoner and his brother into a mews not far from the public house where they had been drinking; and a witness who lived near stated that he heard a noise, and went to the door of his house, and then heard a bayonet fall

<sup>1</sup> R. v. Taylor, 5 Burr. 2793; 1 Hawk. c. 31, s. 39.

on the ground, and on going out heard one Croft crying out "Police, police ; a man is stabbed !" and on going up found the deceased lying on the ground wounded. Croft stated that he was near and heard voices, which induced him to run towards a bar, and when within a yard of the bar he heard a blow like the blow of a fist ; this was followed by other blows ; after the blows he heard a voice say, "Take that !" and in half a minute the same voice said, "He has stabbed me !" the deceased then ran towards him, and said, "I am stabbed !" and soon fell on the ground ; the prisoner was soon afterwards taken into custody, and was then bleeding at the nose ; the prisoner had not any side arms ; but his brother had a bayonet. For the defence the brother stated that when they got about twenty yards through the bar mentioned by Croft, he heard somebody say something, and deceased came up and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner who had gone on ; there was a great struggle between them, and very shortly after the deceased cried out, "I am stabbed !" A surgeon proved that there were wounds on the prisoner's hands, such as would be made by stabs of a bayonet, and that his back was one uniform bruise. Bosanquet, J., to the jury : "The question for you, on a careful consideration of the whole evidence, will be, whether the prisoner was guilty of either murder or manslaughter, or whether the circumstances of the case were such as to entitle him to an acquittal ; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excusable : upon the question of whether it amounts to murder you have to consider this : did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon ? For if he did, it will amount to murder. But if he did not enter into the contest with an intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him ? If he did, then it will be manslaughter. But there is another question : did he use the weapon in defence of his life ? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary ; that he did all he could to avoid it ; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was

in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape. In such case, if he retreated as far as he could, he would be justified." The defendant was found guilty of manslaughter.<sup>1</sup>

§ 434. Upon an indictment for murder, it appeared that a body of persons were committing a riot, and the constables interfering for the purpose of dispersing the crowd, and apprehending the offenders, resistance was made to them by the mob, and one of the constables was beaten severely by the mob; the different persons all took part in the violence used; some by beating him with sticks, some by throwing stones, and others by striking him with their fists: of this aggregate violence, the constable afterwards died. Alderson, B., said: "The principles on which this case will turn are these: if a person attacks another without justifiable cause, and from the violence used, death ensues, the question which arises is, whether it be murder or manslaughter? If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death; and if he intended death, and death was the consequence of his act, it is murder. If no weapon was used, then the question usually is, was there excessive violence? If the evidence as to this be such as that the jury think there was an intention to kill, it is murder; if not, manslaughter. Thus, if there were merely a blow with a fist, and death ensued, it would not be reasonable to infer that there was an intention to kill; in that case, therefore, it is manslaughter. But if a strong man attacks a weak one, though no weapon be used; or if after much injury by beating, the violence is still continued; then the question is, whether this excess does not show a general brutality, and a purpose to kill, and if so, it is murder. Again, if the weapon used be not deadly, *e. g.* a stick, then the same question as above will arise as to the purpose to kill; and in any case if the nature of the violence and the continuance of it be such as that a rational man would conclude that death must follow from the acts done, then it is reasonable for a jury to infer that the party who did them intended to kill, and to find him guilty of murder. Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent. Thus, if

<sup>1</sup> *R. v. Smith*, 8 C. & P. 160.

several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done. Here, therefore, in considering this case, you must determine whether all these prisoners had the common intent of attacking the constables ; if so, each of them is responsible for all the acts of all the others done for that purpose ; and if all the acts done by each if done by one man, would together show such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such purpose, you ought to find them guilty only of manslaughter.”<sup>1</sup>

§ 435. *Provocation must be immediate.* As is elsewhere shown, the blow must be struck on an immediate provocation, and not upon an old grudge ; for then it would amount to murder. Thus, it is not error in a judge to tell the jury, on the trial of an indictment for murder, that “ if they believed from the evidence that the prisoner had malice against the deceased on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner accidentally fell in with the deceased, the question of manslaughter could not arise, as the malice would exclude provocation ; ” it being clear from the context of the charge that the malice spoken of was the purpose to kill or do great bodily harm to the deceased.<sup>2</sup>

And such an indulgence is shown to the frailty of human nature, that where two persons, who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the case.<sup>3</sup>

§ 436. *If the intent was only to chastise*, then the inference of malice drawn from disparity of weapons is greatly weakened.<sup>4</sup>

§ 437. *Where the mortal blow is deliberately given after the deceased is disarmed or helpless, offence is murder.* — Where a party, after he has got the better of the other, holds him prostrate and defenceless, the reception of a prior blow will not reduce the grade to manslaughter. This proposition, in fact, is a corol-

<sup>1</sup> Macklin's case, 2 Lew. 225.

<sup>2</sup> 1 Hawk. P. C. s. 27. See infra,

<sup>3</sup> State v. Tilley, 3 Iredell, 424.

§ 441.

<sup>4</sup> Supra, § 400.

lary of that which makes a blow no mitigating provocation when there is a manifest disparity of strength between the parties. For even where no such disparity at first exists, the principle holds good when by the result of the conflict one party is disarmed, or becomes otherwise helpless. Upon an indictment for murder by strangling, it appeared that the prisoner had said: "We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down; he got up, and I knocked him down again, and kicked him, and then I put a rope round his neck, and dragged him into the ditch." Patteson, J., said to the jury: "If you even believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is murder. The act is so wilful and deliberate that nothing can justify it."<sup>1</sup>

§ 438. *And murder where the attack is sought by the party killing.*—The plea of provocation will not avail in any case, where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice;<sup>2</sup> and it will presently be seen that even where there may have been previous struggling or blows, such plea cannot be admitted, where there is evidence of express malice; and it must appear, therefore, that when he did the act, he acted upon such provocation, and not upon any old grudge.

§ 439. *So it is murder where the revenge is cruel and unusual.*—In this respect the nature of the instrument is to be particularly considered. The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody, who presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died.<sup>3</sup> This was

<sup>1</sup> R. v. Shaw, 6 C. & P. 372.

<sup>2</sup> Rowley's case, 12 Rep. 87; S. C.

<sup>3</sup> 1 Russ. on Cr. 521, 585; State v. Ferguson, 2 Hill's S. C. R. 619; State v. Lane, 4 Iredell, 118; State v. Martin, 2 Iredell, 101; State v. Tilley, 3 Iredell, 424; 1 Hale, 451; Murray v. State, 36 Texas, 642; Lyon v. State, 22 Ga. 399; infra, § 440.

1 Hale 453, in which report the words are, "and strikes C., that he dies." Mr. Justice Foster, in citing the case, says, that the father, after running three quarters of a mile, beats the other boy, "who dieth of this beat-

ruled manslaughter, because done in a sudden heat of passion ; but upon this case Mr. Justice Foster makes the following remarks :<sup>1</sup> " Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted ; a disaster slight enough and very frequent among boys. If upon this provocation the father, after running three quarters of a mile, had set his strength against the child, had despatched him with a hedge-stake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder ; since any of these circumstances would have been a plain indication of malice ; but with regard to these circumstances, with what weapon, or to what degree, the child was beaten, Coke is totally silent. But Croke<sup>2</sup> setteth the case in a much clearer light, and at the same time leadeth his readers into the true grounds of the judgment. His words are : ' Rowley struck the child with a small cudgel, of which stroke he afterwards died.' I think it may be fairly collected from Croke's manner of speaking, and Godbolt's report,<sup>3</sup> that the accident happened by a single stroke with a cudgel not likely to destroy, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I observe that Lord Raymond layeth great stress on this circumstance : that the stroke was with a cudgel not likely to kill."<sup>4</sup>

The converse also is true, that blows will not mitigate a killing by deliberate cruelty. Thus, in a case already cited, it has been correctly held that where A. and B. were fighting, and A. overpowered B., and put a rope around his neck and strangled him, this was murder in A.<sup>5</sup>

§ 440. *Murder to kill in gratification of grudge.*—When a deliberate purpose to kill or do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be

ing." Fost. 294. And see also Mc-Whirt's case, 3 Grat. 594.

<sup>1</sup> Fost. 294.

<sup>2</sup> Cro. Jac. 296.

<sup>3</sup> Godb. 182. It was there said to have been a "rod," meaning probably a small wand.

<sup>4</sup> 2 Lord Raym. 1498. And see also, on this point, R. v. Thomas, 7 C. & P. 817.

<sup>5</sup> R. v. Shaw, 6 C. & P. 372. See also R. v. Willoughby, 1 East P. C. 288.



thrown out of the case, and goes for nothing, if it appear that the killing was the carrying out of the original intent.<sup>1</sup>

§ 441. *But continuance of old grudge not to be arbitrarily presumed.*—It has been said that when the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, unless there is evidence to repel it; and that there must be some evidence to show that the wicked purpose had been abandoned.<sup>2</sup> If by this we are to understand that the defendant is in such case to prove by witnesses that he had abandoned his old grudge, the position cannot be sustained. It is otherwise, however, if we understand the conclusion to be that the presumption of the continuance of the old grudge may be met and overcome by the presumption of its abandonment, which may be drawn from the lapse of time, from the circumstances of the encounter, and from the character of the parties. Thus it has been properly held that a person upon meeting unexpectedly his adversary, who had intercepted him upon his lawful road, and in his lawful pursuit, accepts the fight where he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way, and it will be manslaughter.<sup>3</sup>

On the other hand if one seek another, and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him, if a homicide ensue, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat; for

<sup>1</sup> 1 Vent. 159; 1 Hale, 452; Oneby's case, 2 Ld. Raym. 1490; R v. Smith, 8 C. & P. 160; R v. Mason, 1 East P. C. 232; State v. Johnson, 1 Iredell, 354; State v. Ferguson, 2 Hill (S. C.), 619; State v. Lane, 4 Ired. 113; State v. Tilley, 3 Ired. 424; State v. Tachanatah, 64 N. C. 614; Stewart v. State, 1 Ohio St. R. 366; State v. Green, 37 Mo. 466; Slaughter v. Com. 11 Leigh, 681; Atkins v. State, 16 Ark. 568; Com. v. Crand, 2 Wheel. C. C. 587; State v. Hill, 4 Dev. & B. 481; People v. Stonecipher, 4 Cal. 405; State v. Neeley, 20 Iowa, 108; Vaidon v. Com. 12 Grat. 717; Dock v. Com. 21 Grat. 912; State v. Stoffer, 15 Oh. St. 47; Hayden v. State, 4 Blackf. 547; State v. Hays, 23 Mo. 493; State v. Linney, 51 Mo. 40; Bristow v. Com. 15 Grat. 634; McCoy v. State, 25 Texas, 33; Copeland v. State, 1 Humph. 479; Murray v. State, 36 Texas, 642; Lyon v. State, 22 Ga. 399. See *infra*, § 448.

<sup>2</sup> State v. Johnson, 1 Ired. 354; State v. Tilly, 3 Ired. 424.

<sup>3</sup> Copeland v. State, 7 Humph. 479. See State v. Tachanatah, 64 N. C. 614; *supra*, § 441.

the malice is express.<sup>1</sup> So if A. from previous angry feelings, on meeting with B., strike him with a whip, with the view of inducing B. to draw a pistol, or, believing he will do so, in resentment of the insult, and determines if he do so to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills B., this is murder.<sup>2</sup>

§ 442. Though there had been a quarrel between A. and B. and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, it is murder.<sup>3</sup>

§ 443. The prisoner with the deceased and another brother, and some neighbors, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgel by agreement. All this time no token of anger appeared on either side, till the prisoner, in the cudgel-play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest; but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reprov'd for using such expressions, he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body." The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in

<sup>1</sup> R. v. Smith, 8 C. & P. 160; State v. Lane, 4 Ired. 113; 1 Hale, 451; State v. Ferguson, 2 Hill's S. C. R. 619.

<sup>2</sup> State v. Marten, 2 Ired. 101.

<sup>3</sup> 1 Hale, 451; supra, § 440.

that posture, invited him into the company; but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you, stand off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The judges unanimously agreed that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case showed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon; but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off; but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second; but he advanced as fast, and took the revenge he had vowed. The case was held to be murder.<sup>1</sup>

Where a sufficient legal provocation at the time to extenuate

<sup>1</sup> Mason's case, Fost. 182.

the homicide is proved, it is not competent for the prosecution, in order to show that the act of killing was not by reason of the immediate provocation, but of a preëxisting malice, to prove that a year before the prisoner declared his intention to kill two or three men, it being admitted that the deceased was not one of the men referred to.<sup>1</sup>

§ 444. *Malicious killing in another's quarrel is murder; but in hot blood killing is manslaughter.* — When one person interferes in the quarrel of others, and kills one of the participants from malice, and not from mere wantonness, the party so killing is guilty of murder. Thus, if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants, seeing their master engaged, kill the other, they would be guilty of manslaughter only, but the master of murder. If they take part coolly and knowingly in the killing it would be murder in all.<sup>2</sup> In conformity with this view it has been held in North Carolina that if A. and B. fight upon malice, and C., the friend of A., not being acquainted therewith, come in and take part against B., and kill him, this (though murder in A.) is only manslaughter in C.; yet it would be otherwise if C. had known that the fighting was upon malice, for then it would be murder in both.<sup>3</sup> So if A. and B. maliciously attack D., and C., ignorant of their malice, takes part in hot blood in the struggle, during which D. is killed by A. or B., C. is not guilty of murder, but only of manslaughter.<sup>4</sup> On the same reasoning, if A., having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*; but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. And the law is the same in the case of the master killing the other in defence of the servant.<sup>5</sup>

§ 445. A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl,

<sup>1</sup> State v. Barfield, 7 Ired. 299.

<sup>2</sup> State v. Roberts, 1 Hawks, 351.

<sup>3</sup> 1 Hawk. P. C. c. 31, s. 55. As to the plea of self-defence in such cases, see *infra*, § 532.

<sup>4</sup> Thompson v. State, 23 Alab. 41; Frank v. State, 27 Alab. 38.

<sup>5</sup> 1 Russ. on Cr. 590.

of which blow he died ; and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend.<sup>1</sup> But, as has been observed, it must be intended that the two men who fell out were actually fighting together at the time ; for if words only had passed between them, it would have been murder ; nothing but an open affray or striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man be killed by the person so meddling.<sup>2</sup>

§ 446. *Hot blood extenuates a killing in proportion to the closeness of the relationship of the party interfering.* — A distinction may be taken between the interference of servants and friends, and that of a mere stranger, and there may be cases in which a jury would properly infer hot blood in the interference of a friend or servant, when there could be no such inference as to the interference of a stranger. A stranger may interfere from pity or sense of fairness ; a friend or servant, in addition to such motives, from affection or duty. At the same time, it has been properly observed, that the nearer or more remote connection of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction.<sup>3</sup>

Hot blood is naturally to be expected in the case of a friend taking the side of a friend who is apparently maltreated ; and hence if a third person should take up the cause of a friend who has been worsted in mutual combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter.<sup>4</sup>

In an English case, given by Lord Hale, A. and B. were walking together in Fleet Street, and B. gave some provoking language to A., who thereupon gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently B. ran to his brother's house, which was hard by ; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards ; and C. pursuing him, A. drew his sword, made a pass at

<sup>1</sup> 12 Rep. 89.

<sup>2</sup> 1 Russ. on Cr. 592.

<sup>3</sup> *Infra*, § 519, 532 ; 1 Russ. on Cr. 592 ; *Irby v. State*, 32 Ga. 496.

<sup>4</sup> *State v. Roberts*, 1 Hawks, 351.

C., and killed him. A. being indicted for murder, the court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B. ; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence ; and it appeared plainly upon the evidence that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C. than to avoid him ; and accordingly, at last, it was found manslaughter.<sup>1</sup>

A father struck a fatal blow at the husband under the impulse of a sudden resentment, caused by seeing his daughter violently assaulted by her husband, although not in a manner to endanger her life. It was held, that this was a ground upon which the offence of murder might be reduced to that of manslaughter.<sup>2</sup> That this defence may be extended to all cases where one person is under a duty to protect another is illustrated by an interesting case cited by Blackburn, J., in his testimony, in 1874, before the Homicide Amendment Committee: "Supposing a man is actually keeping company with a young woman ; she cannot be called his sister or his ward, or even under his protection ; and suppose a ruffian steps forward, and in the presence of the other, pulls up her petticoats, and catches hold of her, and the other struck him down, and the man died. That case was before Mr. Justice Pattison, at York ; somehow or other the jury and Mr. Justice Pattison contrived to acquit him altogether. I think that was provocation that would reduce it to manslaughter." <sup>3</sup>

§ 447. *Restraint or coercion is adequate provocation.* — It has been already shown that an illegal attempt to restrain a man's liberty, even under color of legal process, is such provocation as to reduce the offence to manslaughter. This holds where a man is injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword, to prevent him from escaping while he sent for a bailiff to arrest him. Or as where a sergeant put a common soldier under arrest, who thereupon killed the sergeant with a sword, and upon the trial the ar-

<sup>1</sup> 1 Hale, 482 ; *infra*, § 519, 532.

<sup>2</sup> See *supra*, § 412 ; *infra*, § 519,

<sup>3</sup> R. v. Harrington, 10 Cox C. C. 532.

ticles of war were not produced, nor any evidence given of the usage of the army, and so no authority in the sergeant appeared.<sup>1</sup>

Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer, to which the landlord returned the same answer; and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where, when the landlord came, he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might, which was no provocation for the cruel revenge taken; more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with.<sup>2</sup>

The same doctrine was held in a case where a sergeant in the army laid hold of a fifer, and insisted upon carrying him to prison, the fifer resisting; and whilst the sergeant had hold of him to force him, he drew the sergeant's sword, plunged it into his body, and killed him. The sergeant had no right to make the arrest, except under the articles of war; and the articles of war were not given in evidence. Buller, J., considered it in two lights: first, if the sergeant had authority; and, secondly, if he had not, on account of the coolness, deliberation, and reflection with which the stab was given. The jury found the prisoner guilty; but the judges were unanimous that the articles of war

<sup>1</sup> Buckner's case, Styl. 467; With-  
er's case, 1 East P. C. 233; R. v. Cur-  
wan, 1 Moody C. C. 132. Supra, §  
225 *et seq.*

<sup>2</sup> R. v. Willoughby, 1 East P. C.  
288.

should have been produced ; and, for want thereof, held the conviction wrong.<sup>1</sup>

§ 448. *If there be cooling time provocation does not extenuate.* — However great the provocation may have been, if there be sufficient time for the passion to subside and for reason to interpose, the homicide will be murder. Thus, in the case already given of an adulterer, if the husband kill him deliberately and upon revenge, there having been sufficient cooling time, the provocation will not avail in alleviation of the guilt.<sup>2</sup> And where a father was informed that a man had wantonly whipped his son, a small boy, and on the evening of the next day he met the man, and then beat and stamped him with his fist and feet, whilst he was unresisting, with so much violence that the man died from the effects of the beating on the next night, it was held that this was murder, there being evidence of deliberation.<sup>3</sup>

§ 449. *Cooling time for jury.* — If the jury are of opinion that the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might be considered as not being at the moment the master of his own understanding, the offence will be manslaughter ;<sup>4</sup> but if there had been, after the provocation, sufficient time for the blood to cool, and for reason to resume its seat before the mortal wound was given, the offence will amount to murder ;<sup>5</sup> and if the prisoner displayed thought, contrivance, and design, in the mode of possessing himself of the weapon, and again replacing it after the blow was struck, such exercise of contrivance and design may be regarded as indicating rather the presence of judgment and reason than of violent and ungovernable passion. And so when it is proved that the defendant, between the provocation and the blow, had his mind occupied by other subjects, to which he understandingly attended.<sup>6</sup>

In North Carolina it has been intimated that cooling time is a

<sup>1</sup> Wither's case, 1 East P. C. 233.

<sup>2</sup> Fost. 296 ; supra, § 407.

<sup>3</sup> M'Whirt's case, 3 Gratt. 594.

<sup>4</sup> Com. v. Lenox, 3 Brewster, 249 ; R. v. Eagle, 2 F. & F. 827 ; R. v. Kessel, 1 C. & P. 437 ; R. v. Taylor, 5 Burr. 2793 ; Gann v. State, 30 Ga. 67 ; Creek v. State, 21 Ind. 151 ; State v. Decklots, 19 Iowa, 154 ; Underwood

v. State, 25 Tex. 748 ; McCann v. People, 6 Parker C. R. 629 ; State v. Johnson, 30 Tex. 748 ; supra, § 398 et seq. ; Fost. 299.

<sup>5</sup> Ibid. ; People v. Sullivan, 3 Selden, 396 ; Gladden v. State, 12 Fla. 562 ; Smith v. State, 49 Ga. 482.

<sup>6</sup> Com. v. Green, 1 Ashm. 289 ; Com. v. Lenox, 3 Brewst. 249.



question of law for the court.<sup>1</sup> But this view cannot be entertained. Cooling time is a question of fact, dependent not merely on the number of moments or hours elapsing after the provocation, but on the intensity of the provocation, and the temperament of the accused.<sup>2</sup> In England, it is true, it has been said that while the question of time is for the jury, the effect of that time on the defendant is for the court.<sup>3</sup> But even this modification cannot be accepted. Whether the defendant had actually cooled between the injury received by him and the blow is a point to be determined inductively from a series of circumstances (*e. g.* the nature of the injury, the defendant's temperament, his intermediate conduct, as well as the lapse of time), in the same way as is the question of intent. The court is to charge the jury on such points, but cannot arrogate to itself their absolute and exclusive decision.

Thus, if upon a sudden quarrel the parties agree to fight upon the spot, or if, not having their weapons there, they presently, without any other matter intervening, fetch them and go into the field and fight, and one fall, the jury may properly infer hot blood, and hold the case manslaughter;<sup>4</sup> yet if they appoint to fight the next day, or even upon the same day at such an interval of time as that passion might have subsided, or if, before any blows passed, or words of anger, they agree to fight at a more convenient place, or the fight otherwise appear to be upon deliberation, and death ensue, it will be murder.<sup>5</sup>

§ 450. In order to mitigate a homicide committed in a second combat by what occurred at a previous one, which had fairly begun on the sudden, both contests must be considered as making one combat, or the first, as a separate combat, must be considered as a sufficient sudden provocation for either a second combat, or for a subsequent attack producing a contest not entitled to be called a mutual combat.<sup>6</sup>

§ 451. *Cases illustrating cooling time.*—Where the defend-

<sup>1</sup> *State v. Sizemore*, 7 Jones Law, 206; *State v. Moore*, 69 N. C. 611.

<sup>2</sup> *Kilpatrick v. Com.* 7 Casey, 198.

<sup>3</sup> *R. v. Fisher*, 8 C. & P. 182.

<sup>4</sup> *R. v. Hayward*, 6 C. & P. 157; *Com. v. Hare*, 4 Penn. L. J. 257; *Moore*, *ex parte*, 30 Ind. 197.

<sup>5</sup> *Fost.* 297; 1 Hale, 453; *Kel.* 27;

1 Hawk. c. 31, s. 22, 29; 4 Black. Com. 191; 3 Inst. 51; 1 Bulst. 86;

Ld. Morley's case, 7 St. Tr. 421; *Kel.* 56; *Crompt.* 23; 1 Sid. 287. For a

very interesting collection of cases on this point, see Mr. Townsend's *Modern State Trials*, i. 151 *et seq.*

<sup>6</sup> *State v. McCants*, 1 Spear, 384.

ant was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about three hundred yards, passed through his bed room to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two places, saying he had served him right; after this, the prisoner ran home, re-passed through the rooms to the pantry, and went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry. Tindal, C. J., told the jury that the principal question was, whether the wounds were given by the prisoner while smarting under a provocation so recent and showing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only; or whether, after the provocation, there had been time for the blood to cool, and reason to resume its sway before the wound was inflicted, in which case the offence would be murder. The jury found the prisoner guilty of murder.<sup>1</sup>

X § 452. Where a man assailed, to adopt Judge King's statement of this position, has retreated from the assailant, and is secure in his separation from further personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new conflict with the aggressor. If he do so, and slay him, he is guilty of murder or manslaughter, according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leave the scene of outrage, procure arms, and in the heat of blood consequent upon the wrong, return and renew the combat, and slay his adversary, both being armed, such a homicide would be but manslaughter. For the law, from its sense of and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind, smarting under the original wrong.<sup>2</sup>

§ 453. If after a reconciliation the aggressor renews the contest, or attempt to do so, and the other, having a deadly weapon

<sup>1</sup> R. v. Hayward, 6 C. & P. 157.

<sup>2</sup> Com. v. Hare, 4 Pa. L. J. 257.

about him, on such sudden renewal of the provocation uses it without previous intent to do so, this is evidence which may reduce the crime to manslaughter.<sup>1</sup>

§ 454. Upon an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public house till about twelve o'clock at night; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen; the knife, a common bread and cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but not so much so as not to know right from wrong. Lord Tenterden, C. J.: "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been

<sup>1</sup> R. v. Selten, 11 Cox C. C. 674.

drinking in a friendly way together. If you think there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder.”<sup>1</sup>

§ 455. In a leading case, Major Oneby was indicted for the murder of Mr. Gower, and a special verdict was found, stating that the prisoner, being in company with the deceased and three other persons at a tavern in a friendly manner, after some time began playing at hazard, when Rich, one of the company, asked if any one would set him three half crowns, whereupon the deceased, in a jocular manner, laid down three half pence, telling Rich he had set him three pieces, and the prisoner at the same time set Rich three half crowns, and lost them to him, immediately after which the prisoner in an angry manner turned about to the deceased, and said: “It was an impertinent thing to set half pence, and that he was an impertinent puppy for so doing,” to which the deceased answered, “Whoever called him so was a rascal.” Thereupon the prisoner took up a bottle, and with great force threw it at the deceased’s head, but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased, in return, immediately tossed a candlestick or bottle at the prisoner, which missed him, upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword, but the prisoner was prevented from drawing his by the company; the deceased thereupon threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, “We have had hot words, but you were the aggressor; but I think we may pass it over,” and at the same time offered his hand to the prisoner, who made answer, “No, damn you, I will have your blood;” after which, the reckoning being paid, all the company except the prisoner left the room, but he, calling back the deceased, closed the door, and the rest of the company, shortly after, hearing a clashing of swords, found the deceased had received from the prisoner a mortal

<sup>1</sup> R. v. Lynch, 5 C. & P. 324.

wound. It was further found, that from the throwing of the bottles there had been no reconciliation. Upon these facts all the judges were of opinion that the defendant had been guilty of murder, and that from the period which had elapsed there had been reasonable time for cooling.<sup>1</sup>

§ 456. Where it appeared that the prisoner and the deceased, after having been engaged in mutual combat, on sudden occasion, fairly begun, were separated at the request of the prisoner, who was overcome and beaten in the contest; that the prisoner was held by one of the persons present, but drew his knife and swore he would kill the deceased; that after releasing himself from the person holding him, he pursued the deceased, who had left the place of combat, and who, upon being apprised of the pursuit by a call from the person holding the prisoner, left the road on which he was walking and provided himself with a rail from a neighboring fence; that on his return towards the road he met the prisoner, gave back and struck him several blows upon the head as he rushed on with the rail, which, breaking some ten paces from the point where the deceased began to give back, the prisoner closed and inflicted the mortal blow; and that sufficient time had transpired, not only for the deceased to adjust himself after the fight and walk deliberately two hundred and twenty-five yards, but for the prisoner afterwards to pass over the same ground, as also for a person at a neighboring house, within hearing of the noise of the second quarrel, to reach the place of strife. The court, under this state of facts, were of opinion that both contests could not have constituted one combat; nor could the second, in which the prisoner rushed with his drawn knife upon his adversary, who had snatched the readiest means for defence at hand, but was neither equally armed, nor willing to meet such a weapon, have been that fair struggle which the law denominates a mutual combat. The jury having found a verdict of guilty, the court refused to disturb it.<sup>2</sup>

§ 457. The prisoner and his son were wrestling on a floor together, the son being uppermost; the son got up and went to the door, and the prisoner took up a coal pick and threw it at the deceased and hit him on the back. The deceased said it hurt

<sup>1</sup> Major Oneby's case, O. B. 12 Geo. See this case further noticed, *infra*, § 1; 2 Stra. 766, and 2 Ld. Ray. 1485. 466.

<sup>2</sup> State v. M'Cants, 1 Spear, 384.

him, and the prisoner said he would have his revenge. The deceased stood at the door with his hands against it, when the prisoner took a knife off the table and stabbed the deceased with it on the left side. The deceased said, "Father, you have killed me!" and retreated a few paces into the street, reeling as he went. A person told the prisoner he had stabbed his son. He said, "Joe, I will have my revenge!" The deceased came into the house again, and the prisoner stabbed him again in the left side. There was also evidence of expressions of ill-will by the prisoner towards the deceased, and of threats uttered a short time before. Mr. J. Coleridge told the jury: "In some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing. So, in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason that the blows were not the cause of the crime." After observing on the danger of relying on the previous threats, the very learned judge proceeded: "Then I will suppose that all was unpremeditated till C. came, and then the case will stand thus: the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if when he got up and threw the pick at the deceased he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that, which was in the first instance sufficient provocation, was so recent to the actual deadly blow that it excused the act that was

done, and whether the father was acting under the recent sting, or had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acting on its sting, and the blood remained hot; but you must consider all the circumstances,—the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows; because, though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.”<sup>1</sup>

§ 458. Where the defendant, having been violently beaten and abused, made his escape, ran to his house, eighty yards off, got a knife, ran back, and on meeting with the deceased stabbed him, it was held but manslaughter; but it was said that if, on the second meeting, the defendant had disguised the fact of having a weapon for the purpose of inducing the deceased to come within his reach, it would have been murder, such concealment affording ground for the presumption of deliberation.<sup>2</sup>

§ 459. Where it becomes material to inquire whether a homicide committed in a second, after a previous combat, in which it might have been manslaughter, was in course of the first or a continuance of it, or after such an interval of time as would imply premeditation, the proper inquiry in such case is, not whether the suspension of reason continued down to the moment of the mortal stroke given, but did the prisoner cool, or was there time for a reasonable man to have cooled?<sup>3</sup>

§ 460. Where, in New York, the prisoners, three women, each of them armed with clubs, had fallen into a quarrel with the deceased, who was also armed with a club, and had been chased by him for some distance till he stopped, upon which one of them turned round and gave him a mortal blow, it was held manslaughter.<sup>4</sup> The indulgence which the law extends to cases of this description is founded on the supposition that a state of sudden and violent exasperation is generated in the affray, so as to produce a temporary suspension of reason, and that the transport of passion excludes the presumption of malice.<sup>5</sup>

<sup>1</sup> R. v. Kirkham, 8 C. & P. 115.

Wheeler's C. C. 347; U. S. v. Thayer,

<sup>2</sup> State v. Norris, 1 Hay. 429.

U. S. Circuit Court, 2 Wheeler's C. C.

<sup>3</sup> State v. M'Cants, 1 Spear, 384.

503.

<sup>4</sup> People v. Garretson et al. 2

<sup>5</sup> People v. Garretson, supra.

§ 461. "When an assault," says a very able jurist,<sup>1</sup> "is returned with a violence manifestly disproportionate to the assault, the character of the combat is essentially changed, and the assaulted becomes in his turn the assailant. Such, according to the case, was the state of this affray, when the mortal wound was given. To avenge a blow, the deceased attacked the prisoner with a knife — made three cuts at him — and gave him a severe wound in the abdomen. If, instantly thereupon, in the transport of passion thus excited, and without previous malice, the prisoner killed the deceased, it would have been a clear case of manslaughter. Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumed that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent; but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an *infirm* human being. We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the *furor brevis*, renders a man deaf to the voice of reason; so that, *although the act done was intentional of death*, it was not the result of malignity of heart, but imputable to human infirmity.

§ 462. "The proper inquiry to submit to the jury on this part of the case was, whether a sufficient time had elapsed after the prisoner was stabbed, and before he gave the mortal wound, for passion to subside and reason to reassume her dominion; for it is only during the temporary dethronement of reason by passion that this allowance is made for man's frailty. And in prosecuting this inquiry, every part of the conduct of the prisoner, as well words as acts tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered, in order to conduct the jury to a proper result.

"The attorney general, in his argument, referred to a class

<sup>1</sup> Gaston, J., *State v. Hill*, 4 Dev. & Bat. 491.



of cases, which probably misled the judge in laying down the proposition before us, in which circumstances apparently unimportant, but indicative of deliberation, have been thought to establish malice, and repel the idea of human infirmity. The explanation given by the text writers will show that the doctrine in these cases, although in some respects analogous to that which obtains in a killing upon legal provocation, is not identical with it. The general rule of law is, that words of reproach, or contemptuous gestures, or the like offences against decorum, are not a sufficient provocation to free the party killing from the guilt of murder, where he useth a deadly weapon, or manifests an intention to do great bodily harm.

"This rule, however, does not obtain where, because of such insufficient provocation, the parties become suddenly heated and engage immediately in mortal combat, fighting upon equal terms. But deliberate duelling, if death ensue, however fairly the combat may be conducted, is, in the eye of the law, murder. The punctilios of false honor, the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the State, and with that wicked purpose which is termed malice aforethought. While, therefore, because of presumed heat of blood, the law extenuates into manslaughter a killing upon such sudden rencounter, although proceeding upon an insufficient provocation, it withholds this indulgence when, from the circumstances of the case, it can be collected that, not heated blood, but a settled purpose to vindicate offended honor, even unto slaying, in defiance of law, was the actual motive which urged on to the combat."

§ 463. *Killing in duel is murder.* — Cool and deliberate homicide in a duel is murder in the guilty party, and this, though the latter had received the provocation of a blow,<sup>1</sup> or had been threatened with dishonor.<sup>2</sup> It is the deliberation which constitutes the grade of guilt. Thus if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., in safeguard of his own life, kills A., this is murder in B.; because

<sup>1</sup> *R. v. Young*, 8 C. & P. 144; *Cuddy*, 1 Car. & Kir. 209; *R. v. Sel-Smith v. State*, 1 Yerger, 228; *R. v. ten*, 11 Cox C. C. 674; *supra*, § 335.

<sup>2</sup> 1 Hale, 452.

their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done.<sup>1</sup>

If the meeting to fight be intentional, no subsequent hot blood will be a defence. Thus where B. challenges A., and A. refused to meet him, but in order to evade the law, A. told B. that he should go the next day to a certain town about his business, and accordingly B. met him in the road to the same town, and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder ; but the same conclusion would not follow if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting.<sup>2</sup> For in truth the duellist has engaged in an act highly unlawful, in defiance of the laws, and he must at his peril abide the consequences ; and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time on account of the disadvantage he should have by reason of the height of his shoes, and presently

<sup>1</sup> 1 Hale, 452, 480, who says, " Thus is Mr. Dalton, cap. 93, p. 241 (new ed. c. 145, p. 471), to be understood." But a *qu.* is added in 1 Hale, 452, whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A. refusing to decline it had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder ; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East P. C. c. 5, s. 54, p. 284 *et seq.*, and it is observed that Mr. J. Blackstone (4 Black. Com. 185) expressly puts the same case of a duel as Lord Hale, but without subjoining the

same doubt ; and that it was considered as settled law by the chief justice, in Oneby's case. Lord Raym. 1489. Mr. East, after reasoning in favor of the extenuation of the duellist so declining to fight, proceeds thus : " Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law." 1 East P. C. c. 5, s. 54, p. 285.

<sup>2</sup> 1 Hawk. P. C. c. 31, s. 23 ; 1 Hale, 453 ; *supra*, § 335.

afterwards went into a field and fought; the circumstance was relied on as showing that he did not fight in the first passion.<sup>1</sup> On the other hand, where upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled.<sup>2</sup> It is to be supposed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard; therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence.<sup>3</sup>

§ 464. Lord Byron and Mr. Chaworth differed at a club as to the best means of procuring game. Mr. C. mentioned Sir C. Sedley's manors; Lord B. asked which they were; Mr. C. named Nuttall and another; Lord B. repeated his question; Mr. C. said, "Surely you will allow Nuttall to be Sir C. Sedley's; but if you have anything more to say, you will find Sir C. Sedley in Dean Street, and me in Berkeley Row." The conversation then

<sup>1</sup> Bromwich's case, 1 Lev. 180; 1 Sid. 277; 7 St. Tr. 42. Bromwich was indicted for aiding and abetting Lord Morley, in the murder of Hastings.

For a valuable collection of cases on this point, see Mr. Townsend's *Modern State Trials*, i. 151 *et seq.* The English judges, though generally laying down the law with becoming precision, sometimes go beyond our American authorities in mawkish sensibility with the accused. Thus, on the trial of Purefoy, for killing Colonel Roper in a duel, at Maidstone, in 1794, Baron Hotham thus charged the jury: "The oath by which I am bound obliges me to say that homicide, after due interval of consideration, amounts to murder. The laws of England, in their utmost lenity and allowance for human frailty, extend their compassion only to sudden and momentary frays; and then,

if the blood has not had time to cool, or the reason to return, the result is termed manslaughter. Such is the law of the land, which undoubtedly the unfortunate gentleman at the bar has violated, though he has acted in conformity to the laws of honor. His whole demeanor in the duel, according to the witness whom you are most to believe, Colonel Stanwid, was that of perfect honor and perfect humanity. Such is the law, and such are the facts. If you cannot reconcile the latter to your conscience, you must return a verdict of guilty. But if the contrary, though the acquittal may trench on the rigid rules of law, yet the verdict will be lovely in the sight both of God and man." 1 Townsend's *Modern St. Trials*, 154.

<sup>2</sup> 1 Hale, 453; 1 Hawk. P. C. c. 31, s. 29; 3 Inst. 51.

<sup>3</sup> Fost. 138, 296.

dropped, and they stayed together at least half an hour ; and Lord B. during that time conversed with a gentleman who sat next him ; Mr. C. settled the bill, but made a mistake in marking the club room, which might arise from agitation ; he marked Lord B. as absent, though he was there. Mr. C. then went out, and a Mr. Donston followed him, of whom Mr. C. asked if he had been short with Lord B. in what he said last to him ; to which Mr. Donston answered " No," and was returning into the room when he met Lord B. coming out. Lord B. said to Mr. C., " I want to speak to you ;" upon which they both called the waiter, and were shown into a small room, and the waiter left a candle in the room. Lord B. asked Mr. C. if he meant the conversation upon game to Sir C. Sedley or to him ; upon which Mr. C. said, " If you have anything to say, we had better shut the door, or we shall be heard ;" and he shut the door. On turning from the door he saw Lord B.'s sword half drawn, and Lord B. said, " Draw, draw." Mr. C. drew, and thrust at Lord B. ; and after one or two thrusts, Mr. C. received a mortal wound, of which he died. An indictment was preferred for murder ; but upon the trial the peers were unanimous that it was manslaughter only.<sup>1</sup>

§ 465. Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern ; and on coming out Sir Charles P. and Mr. W. quarrelled and drew their swords, and Mr. W. ran Sir Charles P. through the body, and he died. There was no evidence of any unfair advantage taken by Mr. W. ; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles P.'s body ; and it appeared that the parties did not know each other before. When Sir Charles P. fell, Mr. W. took him by the nape of the neck, dashed his head upon the ground, and said, " Damn you, you are dead." Jenner, B., told the jury that this was only manslaughter ; the jury however, were disposed to find it murder, because of the dashing the head against the ground, &c. ; but Allibone, J., repeated to them it was manslaughter only, and they found accordingly.<sup>2</sup>

§ 466. But where malice is proved, the fact of combat is no defence, and malice may be inferred from the violence of the

<sup>1</sup> R. v. Lord Byron, 11 St. Tr. 1177.

<sup>2</sup> R. v. Walters et al. 12 St. Tr. 113.

prisoner, and from deliberation. Thus in Major Oneby's case,<sup>1</sup> all the judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should be taken, upon the facts found in the verdict and the argument of the chief justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under these circumstances the court were of opinion that the prisoner had had reasonable time for cooling; after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether showed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances; for it must have been implied, according to Mawgridge's case, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him.<sup>2</sup>

§ 467. *Seconds also responsible for murder.* Not only the *principals*, but the *seconds*, in a deliberate duel, are guilty of homicide.<sup>3</sup> And with regard to other persons who are so present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present, and assisting and

<sup>1</sup> See facts of this case given, *supra*, § 455.

<sup>2</sup> R. v. Young, 8 C. & P. 644. See *supra*, § 335.

<sup>3</sup> R. v. Oneby, 2 Str. 766; 2 Ld. Raym. 1485.

encouraging at the moment when the pistol is fired, they are guilty of murder.<sup>1</sup>

§ 468. In a case before Williams, J., in 1843, the indictment charged a person named Munro with the murder of David Lynar Fawcett; and the prisoner with being present, aiding and abetting Munro in the act. The death of the deceased, Colonel Fawcett, was shown to have occurred on the 1st of July, in a duel, at Camden Town, in which Lieutenant Munro was one of the principals, and the prisoner was said to have acted as the second of the deceased. The evidence as to the prisoner's identity was not very direct and positive. Williams, J. (Rolfe, B., being present), in summing up, said: "The question is, whether the prisoner was at the spot at the time, and whether he took such a part as amounts, in the language of this indictment, to an aiding and abetting of the principal offender. I am bound to tell you, as a matter about which my learned brother and myself have no doubt (nor I believe has any other judge any doubt about it), that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting that death, will be guilty of abetting the principal offender. I give them no particular name, but say, that all persons who are present, aiding, assisting, and abetting that deliberate duel are within the terms of such an indictment as this. With respect to the facts, there is very little doubt, if any, that Colonel Fawcett was killed in a duel on the day mentioned in the indictment; and if the parties went out coolly and deliberately to fight the duel, then the killing by Lieutenant Munro will amount to murder; and then the question will arise, whether the prisoner at the bar was present at that time aiding, assisting, and abetting the combatants on that occasion. Lord Hale, though an exceedingly sound lawyer, considered that, as far as related to the second of the party killed, the rule of law had been too far strained; and seems to have doubted whether such second should be deemed a principal in the second degree. But if this doubt were correct, it might be suggested, on the same principle, that Colonel Fawcett was guilty of suicide. Such a course is straining the principles of law till they become revolting to common sense." The jury acquitted.<sup>2</sup>

<sup>1</sup> R. v. Young, 8 C. & P. 644.

<sup>2</sup> R. v. Munro, 1 C. & K. 209.

## CHAPTER XIV.

### MISADVENTURE.

A person who unintentionally and non-negligently, when doing a lawful act, kills another, is to be acquitted, § 470.

But there must have been no intention to do harm, § 472.

Proper precautions should have been taken, § 473.

Driving or riding, § 474.

Dropping things from house, § 475.

Poison, § 476.

Fire-arms, § 477.

Mistake as to person, § 478.

Act must have been lawful, § 479.

§ 470. *A person who unintentionally and non-negligently, when doing a lawful act, kills another, is to be acquitted.* — Under the general head of excusable homicide, the older text writers included homicide *per infortuniam*, or misadventure, which is the subject of this chapter, and homicide *se et sua defendendo*, which is the subject of the next. The term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. "It appears to be the better opinion," says Sir William Russell,<sup>1</sup> "that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them;<sup>2</sup> and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out. At the present time, in order to prevent this expense, it is usual for the judges to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure or by self-defence."<sup>3</sup>

§ 471. In the United States no penalty of any kind has ever been inflicted on excusable homicide; it having been the invariable practice for the court to direct the jury to acquit when this defence is made out.

<sup>1</sup> 1 Russ. on Cr. 656.

<sup>2</sup> Ibid.; Foet. 288.

<sup>3</sup> 4 Bl. Com. 188.

Homicide by misadventure<sup>1</sup> is where one without intention of bodily harm, and with all proper precaution against danger while

<sup>1</sup> Accident or *casus*, with which misadventure may be regarded as convertible, is sometimes defined to be an extraordinary interruption of a natural law; sometimes the interposition of a condition not under ordinary circumstances to be expected. Whart. on Neg. § 114; Pollock, C. B., in *Rigby v. Hewitt*, 5 Exch. 243; cited by Byles, J., in *Hoey v. Felton*, 11 C. B. N. S. 143, and *Greenland v. Chapin*, *Ibid.* 248. For the consequences of such accident or *casus* responsibility cannot be imputed. See *Wakeman v. Robinson*, 1 Bing. 215; *Hall v. Fearnley*, 3 Q. B. 913.

The "Act of God," by which term *casus* is sometimes described in Anglo-American law, signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning. Per Lord Mansfield, C. J., in *Forward v. Pittard*, 1 T. R. 33; Bell, Dict. & Dig. of Scotch Law, p. 11; *Trent Navigation v. Wood*, 3 Esp. 131; *Oakley v. Steam Packet Co.* 11 Exch. 618; *Blyth v. Birmingham Water Works Co.* 11 Exch. 781. The above maxim may, therefore, be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches. 1 Rep. 97; *Broom's Legal Maxims*, 5th ed. p. 230.

As illustrating *casus* may be noticed cases where accidents arise from foggy weather, or the removal of accustomed landmarks; *Crofts v. Waterhouse*, 3 Bing. 319, 321; where a rat made a

hole in a box where water is collected in an upper room, so that the water trickles out, and flows upon goods in a lower room; *Carstairs v. Taylor*, Law Rep. 6 Exch. 217; where an act of parliament directed a water company to lay down pipes with plugs in them as safety-valves to prevent the bursting of the pipes, and the plugs were properly made and of proper material, and a severe frost occurring, the plugs were prevented from acting, and the pipes accordingly burst and flooded the plaintiff's cellar; *Blyth v. The Birmingham Water Co.* 11 Ex. 781; where a fall of snow prevented a traveller from discovering a defect in a road; *Street v. Holyoke*, 105 Mass. 82; *Day v. Mitford*, 3 Allen, 98. See *Aston v. Heaven*, 2 Esp. 533; *Jackson v. Belleview*, 30 Wisc. 257; *Ham-mack v. White*, 11 Com. B. N. S. 588; 31 L. T. C. P. 129; and where the defendant's horse, being frightened by the sudden noise of a butcher's cart which was driven furiously along the street, became unmanageable, and plunged the shaft of a gig into the breast of the plaintiff's horse. *Wake-man v. Robinson*, 1 Bing. 213; 8 Moore, 63. See *Blyth v. Birmingham Water Works Co.* 11 Ex. 781. So an unusual water flood, of a character not to be foreseen, and preventing safe transportation, is an act of God which will be a defence, if there be no want of diligence in the carrier. *Wal-lace v. Clayton*, 42 Geo. 443; *Angell on Carriers*, 153; but not so with the falling of the tide, causing a vessel to strand, for this could have been foreseen and provided against. *Bohan-non v. Hammond*, 42 Cal. 227.

We may notice, also, in this connection, as illustrating the same principle, a case put in the Digest, where



doing a lawful act, unfortunately kills another. To constitute this defence three requisites exist:—

1. There must have been no intention to do harm.

the builder of a house, in excavating the cellar, piled up a heap of earth against an adjacent house. A rain storm of extraordinary continuance, *assiduis pluviis*, set in, which so saturated the heap that it communicated such dampness to the adjoining wall that the latter fell in. Labeo decided that, on the ground of the extraordinary character of the rain, to which, and not to the heaping of the earth (which was a usual incident of building), the damage was attributable, no liability attached to the builder: *Quia non ipsa congestio, sed humor ex ea congestione postea damno fuerit.* L. 57. D. 19. 2. See Whart. on Neg. § 927, 930. The extraordinary and unprecedented character of the rain is spoken of as something *extrinsecus*, breaking the causal connection. And of this decision Javolenus approves. That this is based on the *casus* of the rain coming with such unusual quantity and persistence is shown by another passage, in which he declared that when, *through defective water-pipes laid down by another*, water reaches and saps my wall, such other person is liable for the damage done. “*Si fistulae, per quas aquam ducas, aedibus meis applicatae damnum mihi dent, in factum actio mihi competit.*” L. 18. D. de serv. praed. urb. 8. 2; Bar, *ut sup.* p. 130. In the first case there was no liability, because the damage was done by an extraordinary condition extrinsic to the defendant's action; in the second case there was liability, because the bursting of the pipe was a natural consequence of its defectiveness.

It must be remembered that by the Roman law, which in this respect lies at the foundation of our own, responsibility (*imputatio*) ceases where

accident (*casus fortuitus*, or simply *casus*) intervenes. If there is nothing to be imputed to the defendant, there is nothing with which he is chargeable. “*Ac ne is quidem hac lege tenetur, qui casu occidit* (the action being for damages under the Aquilian law), *qui casu occidit, si modo culpa ejus nulla inveniatur.*” § 3. L. de Leg. Aq. “*In hac actione, quae ex hoc capitulo oritur, dolus et culpa punitur.* Ideoque si quis in stipulam suam, vel spinam, comburendae ejus causa, ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, *requiramus, num imperitia ejus aut negligentia id occidit.* Nam si die ventoso id fecit, culpa reus est; nam et qui occasionem praestat, damnum fecisse videtur. In eodem crimine est, et qui non observavit, ne ignis longius est procederet. *At si omnia quae oportuit, observavit, vel subita vis venti longius ignem produxit, caret culpa.*” L. 39. § 3. D. de Leg. Aq. ; Paulus, lib. 22. ad Edict. Here, where the amount of care is not graduated by a special obligation, the term *quae oportuit* indicates that *casus* excuses only when every reasonable precaution has been taken.

The limits of *casus* are thus concretely defined in the Digest: “*Si putator ex arbore ramum cum dejecerit, vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat, nec ille proclamaverit, ut casus ejus evitari possit.* Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi; *culpam autem esse, cum quod a diligente provideri poterit, non esset provisum*, aut tum denunciata esset, cum periculum evitari non posset. Secundum quam

2. Proper precaution must have been taken to avoid mischief.
3. The act must have been lawful.

rationem non multum refert, per publicum an per privatum, iter fieret, cum plerumque per privata loca vulgo iter fiat. Quod si nullum iter erit, dolum duntaxit praestare debet, ne immittat in eum, quem viderit transeuntem, nam culpa ab eo exigenda non est, cum divinare non poterit, an per eum locum aliquis transiturus sit." L. 31. D. ad Leg. Aquil.; Paulus lib. 10 ad Sabinum. Sabinus, to apply this decision to our own law, where the bough of a tree or any other heavy article is dropped, makes a distinction between the dropping on a public or on a private place. But Mucius, and after him Paulus, held that this distinction does not settle the question of liability. That question depends upon *culpa*; and *culpa* here depends upon diligence. Could the danger, by a diligent man, have been averted? But what is *diligence*? Hasse, in his authoritative treatise on *Culpa*, gives the following answer: *Diligence exists when there is applied a degree of carefulness which is competent for the average human capacity.* We cannot say of one who is simply not of extraordinary diligence that he is undiligent or negligent. The test is, not such extraordinary abilities and intense diligence as few possess, but such abilities and diligence as are usual with good and prudent men undertaking the particular work. See Whart. on Neg. § 45.

The following additional illustration may be here adduced: "Cum pila complures luderent, quidam ex his servulum, cum pilam praecipare conaretur, impulsi, servus, cecedit, et crus fregit. Quaerebatur, an dominus servuli Lege Aquilia cum eo, cujus impulsu ceciderat, agere posset. Respondi, non posse, cum casu magis quam culpa vi-

deretur factum." L. 52. § 4. D. ad Leg. Aquil. Alfenus, Lib. 2. Dig. No doubt misfortunes such as those mentioned in the last extract could have been avoided by the exercise of the highest possible degree of care. But what person, according to the ordinary laws of human nature, can persistently maintain such a condition of mental tension as to insure such avoidance? Who, particularly, can maintain this tension while playing a game? Or how can we require indiscriminately from all men a degree of quickness and keenness in the observing and avoiding danger which is given to but few? Hence, when we have no right to expect such extraordinary vigilance and acuteness, and when the danger could only have been avoided by such extraordinary vigilance and acuteness, the result is attributed to *casus* or accident.

At the same time it must be remembered that diligence and caution are to be exercised proportionate to the critical character of the duties imposed. Certain dangerous instrumentalities — e. g. steam — are essential to the welfare of society. It may be negligent to expose complicated steam machinery in a thoroughfare when it would not be negligence to expose it in a house. So with regard to poison. An apothecary may without negligence expose poison on his counter when he could not without negligence expose it on the table of a hotel where he may be boarding. So a common carrier is bound to exercise a higher degree of care as to the passengers inside his carriage, and the probabilities of whose danger he is obliged to be constantly canvassing, than he is to persons who may happen to unexpectedly appear on his track. See Whart. on Neg. § 48.

1. *There must have been no intention to do harm.*

§ 472. If there was any malice in the matter, the offence becomes murder.<sup>1</sup> Thus a party, the head of whose hatchet accidentally flies off (it having been properly secured), and kills another, is guilty only of misadventure, unless there was intention to do harm; in which latter case it is murder.<sup>2</sup>

2. *Proper precaution must have been taken to avoid mischief.*

§ 473. The discussion of this topic more properly belongs to the department of Negligence, where it has been introduced.<sup>3</sup> Where the diligence and care usual with prudent persons under the circumstances are omitted, then, we may here repeat, liability for the consequences attaches.

§ 474. *Driving or riding.* — Thus, where a person was riding a horse, and the horse, being whipped by some other person, sprang out of the road and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse.<sup>4</sup> Where, however, a similar accident occurred in consequence of a carter leaving his horse's head and sitting inside, it would be manslaughter,<sup>5</sup> and such indeed is the law in all cases where there is any negligence.<sup>6</sup> The question in such cases is, whether the street driven in is one so frequented as to make particular care necessary. If the latter be the case, the offence would seem to be but manslaughter. Thus, A. was driving a cart with four horses in the highway at Whitechapel, he being in the cart, and the horses being upon a trot, threw down a woman who was going the same way with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovell, held this to be only misadventure; but it was said by Lord Holt, that if it had been in a street where people usually pass, it would have been manslaughter.<sup>7</sup>

Generally speaking, where a person, driving a cart or other carriage happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could

<sup>1</sup> 1 Russ. on Cr. 657. See *supra*,

<sup>5</sup> Knight's case, 1 Lew. 168.

§ 35.

<sup>6</sup> 1 Russ. on Cr. 650.

<sup>2</sup> 1 Hawk. P. C. c. 29, s. 2.

<sup>7</sup> 1 East P. C. c. 5, s. 33, p. 263.

<sup>3</sup> See *supra*, § 361 *et seq.*

See *supra*, § 107.

<sup>4</sup> 1 Hawk. P. C. c. 29, s. 3.

be imputed to the driver, it will be accidental death, and the driver will be excused.<sup>1</sup>

§ 475. *Dropping things from a house.* — If workmen throw stones, rubbish, or other things from a house in the ordinary course of their business, by which a person underneath happens to be killed, this will be misadventure only, if it were done in a retired place where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given to such as might be below.<sup>2</sup>

§ 476. *Poison.* — Though where one lays poison to kill rats, and another takes it and dies, this is misadventure; yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food, for that would betoken great inadvertence, and might in some cases amount to manslaughter.<sup>3</sup>

§ 477. *Fire-arms.* — The owner of a cornfield, having deer frequenting his cornfield, out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and set A., his servant, to watch in another corner of the field with a gun charged with bullets, giving him orders to shoot when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself; and the servant, supposing it to be the deer, shot and killed the master. This was ruled by Lord Hale to be misadventure, on the ground that the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. It seemed, however, to Lord Hale himself, that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark.<sup>4</sup> Mr. East, however, tells us upon this, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act; and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prose-

<sup>1</sup> *Fost.* 268; 1 *Hale*, 476; *supra*, § 110.

<sup>2</sup> 1 *Hale*, 481; 1 *East P. C.* s. 40, p. 266; *supra*, § 92.

<sup>3</sup> 1 *Hale*, 472; *Fost.* 262; *supra*, § 99.

<sup>4</sup> 1 *Hale*, 476; *supra*, § 88.

cution of some lawful act.<sup>1</sup> Where a commander, coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such ; the sentinel not being able to distinguish his commander, under such circumstances, from an enemy, it is but misadventure.<sup>2</sup>

Such caution is necessary as is usual and ordinary in similar cases ; extreme and the utmost caution cannot be insisted upon. Thus, where a man discharges a loaded pistol when he has reason to believe it was unloaded, and kill another, the weight of authority is that it is misadventure. Mr. Justice Foster says, that accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations ; and then proceeds to state a case of a similar accident, in which the trial was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbors, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way ; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger, and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game ; but, before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it to all appearance as he had left it. " I did not inquire," says Mr. J. Foster, " whether the poor man had examined the gun before he carried it home ; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury that if they were of the same opinion they should acquit him ; and he was acquitted." <sup>3</sup>

§ 478. *Mistake as to person.* — In a famous case, which is dis-

<sup>1</sup> 1 Hale, 476 ; *supra*, § 88.

<sup>2</sup> Fost. 265.

<sup>3</sup> 1 Hale, 42.

cussed in other sections, where it appeared that the defendant being in bed and asleep in his house, his maid-servant, who had hired the deceased to help her to do her work, as she was going to let her out about midnight, thought she heard thieves breaking open the door; upon which she ran up-stairs to her master, and informed him thereof; who rising suddenly and running down-stairs with his sword drawn, the deceased hid herself in the buttery, lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving she had been a thief, cried out, "Here they be that would undo us." Thereupon the defendant ran into the buttery in the dark, not knowing the deceased, but taking her to be a thief, and thrusting with his sword before him, killed her. This was ruled to be a misadventure.<sup>1</sup>

3. *The act must have been lawful.*

§ 479. Where unsuitable and deadly weapons are used in lawful games, the act itself becomes unlawful.<sup>2</sup> Lord Hale went so far as to hold that death, which occurred in such sports and exercises as give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling by consent, was manslaughter;<sup>3</sup> but such is not the law.<sup>4</sup> And certainly, as remarks a more recent writer, though it cannot be said that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and, though the weapons used be not of a deadly nature, yet if they may breed danger, there should be due warning given, that each party may start upon equal terms. For if two be engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not to murder, the intent not being malicious.<sup>5</sup>

<sup>1</sup> Levet's case, Cro. Car. 438; 1 Hale, 42, 474.

<sup>4</sup> Fost. 260; 1 East P. C. c. 5, s. 41, p. 268.

<sup>2</sup> 1 Hale, 475; Fost. 289; supra, § 161-163.

<sup>5</sup> 1 East P. C. c. 25; infra, § 161-166.

<sup>3</sup> 1 Hale, 472; supra, § 161-166.

## CHAPTER XV.

### EXCUSE AND JUSTIFICATION.

#### I. REPULSION OF FELONIOUS ASSAULT, § 480.

What the nature of the assault must be, § 480.

Force of defence to be proportioned to force of attack, § 480.

Necessity does not continue when the defendant retreats to a place of safety, arms himself, and then returns to renew the conflict, § 481.

Conflict provoked by defendant is no defence, § 482.

But where defendant withdraws from such conflict then his right of self-defence revives, § 483.

Retreat is necessary when practicable, § 485.

Right does not exist when there is an opportunity to restrain the assailant by process of law, § 488.

Doctrine illustrated by *The Virginian* case, § 490.

Whether the danger is apparent is to be determined from the defendant's stand-point, § 493.

Impracticable to take ideal "reasonable man" as a standard, § 494.

Ambiguity of the authorities cited to this effect, § 495.

And so of several penal codes, § 504.

Weight of authority is that it is sufficient if the danger is apparent to the defendant, § 505.

Pennsylvania, § 508.

Massachusetts, § 509.

Ohio, § 510.

Michigan, § 511.

New York, § 512.

Tennessee, § 514.

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Mississippi, § 517 a.

Iowa, § 518.

Analogy from cases of interference in others' conflicts, § 519.

On principle, the test is the defendant's honest belief, § 520.

But although the defendant believes he is in danger of life, and so believing kills his assailant, he is guilty of manslaughter if this belief is imputable to his negligence, § 527.

Apparent attack, to be an excuse, must have actually begun, § 530.

Yet this is to be tested by the defendant's capacity, § 531.

Right may be exercised by servants and friends, § 532.

#### II. PREVENTION OF FELONY, § 533.

*Bona fide* belief that a felony is about to be perpetrated excuses homicide in its prevention, § 533.

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Necessity must be unprovoked, § 535.

Right cannot be exercised when there is an opportunity to appeal to law, § 536.

If felonious attempt is abandoned and offender escapes, killing him without warrant in pursuit is murder, § 537.

No killing is excusable if the crime resisted could be prevented by less violent action, § 538.

Felonies and riots may be thus prevented, § 539.

Trespass no excuse for killing trespasser, § 540.

#### III. PROTECTION OF DWELLING-HOUSE, § 541.

A person when attacked in dwelling-house need retreat no further, § 541.

House may be defended by taking life, § 542.

But right is only of self-defence and prevention, § 543.

Friends may unite in such a defence, § 549.

What are "houses" within this exception, § 550.

Felonies on buildings not dwelling-houses may be thus prevented, § 551.

Right does not excuse killing intruder in house, § 552.

Killing by spring-guns, when necessary to exclude burglars, excusable, § 553.

IV. EXECUTION OF LAWS, § 554.

Killing under mandate of law justifiable, § 554.

V. SUPERIOR DUTY, § 555.

Risk of killing another to be, in extreme cases, preferred to certain death, § 555.

Sacrifice of child's life in order to save mother, § 557.

VI. NECESSITY, § 558.

Defence only good when danger is immediate, and when the life of the defendant can only be saved by the sacrifice of the deceased, § 558.

Not barred by culpability, § 559.

I. REPULSION OF FELONIOUS ASSAULT.

*What the nature of the assault must be.*

§ 480. *Force of defence to be proportioned to force of attack.*—This is a cardinal doctrine of the Roman law: *vim vi repellere licet*. A crime is threatened; and it is my right to repel it, whether such crime be levelled at others or myself.<sup>1</sup> But the

<sup>1</sup> That this right exists to repel a felony is well established. Wh. Cr. Law, 7th ed. § 1001, 1039; 1 East P. C. 259, 271; Dill v. State, 25 Alab. 15; Oliver v. State, 17 Alab. 15; Kingen v. State, 45 Ind. 518; Pond v. People, 8 Mich. 150; U. S. v. Wiltberger, 3 Wash. C. C. 515; People v. Doe, 1 Mich. 451; People v. Campbell, 30 Cal. 812; Murphy v. People, 37 Ill. 447.

Cicero (pro Milo, c. 4) thus speaks: Est hæc non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus, ad quam non docti, sed facti, non instituti, sed imbuti sumus: ut, si vita nostra in aliquas insidias, si in vim, et in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esset expediendæ salutis. Silent enim leges inter arma, nec se expectari iubent, quum ei, qui expectare velit, ante iniusta poena luenda sit, quam iusta repetenda. L. 3. D. de iust. et iur. (1. 1.) Ut vim atque iniuriam propulsemus (iuris gentium est). Nam iure hoc evenit, ut, quod quisque ob

tutelam corporis sui fecerit, iure fecisse existimetur: et quum inter nos cognitionem quandam natura constituit, consequens est, hominem homini insidiari nefas esse. L. 4. pr. D. ad L. Aquil. (9. 2.) . . . nam adversus periculum naturalis ratio permittit se defendere. L. 45, § 4. eod. Qui, quum aliter tueri se non possent, damni culpam dederint, innoxii sunt: vim enim vi defendere omnes leges omniaque iura permittunt. L. 1. § 27. D. de vi et de vi arm. (43. 16.) Vim vi repellere licere, Cassius scribit: idque ius natura comparatur.

"All our jurists hold that a certain quantity of risk to life or limb justifies a man in shooting or stabbing an assailant; but they have long since given up in despair the attempt to describe in precise words that quantity of risk. They only say that it must be, not a slight risk, but a risk such as would cause serious apprehensions to a man of firm mind; and who will undertake to say what is the precise amount of apprehension which deserves to be called serious, or what is the precise texture of mind which deserves to be



offence threatened must be a *crime*. "Felony" has, in our law, been used to express the distinction; but this is not sufficiently exact, because a private person is authorized to take life to stop a riot, and a riot, though likely to involve felonies in its development, is technically but a misdemeanor.<sup>1</sup> Certainly a mere assault, not felonious, cannot excuse homicide.<sup>2</sup> If a deadly weapon be not used by the assailant, or other circumstances do not exist to indicate a felonious attempt, for the assailed to take life is at least manslaughter. "The intent," as is said by Judge Washington,<sup>3</sup> "must be to commit a felony. *If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor.*"<sup>4</sup> If, however, such intended beating is of a character to imperil life, or to maim, then the intent is felonious, and the assailed is excused in taking life when necessary to repel the assault.<sup>5</sup> On the other hand, the killing of an assailant under such circumstances, the design of the assailant being to beat and not to commit a felony, is not murder, and at the highest is manslaughter.<sup>6</sup>

called firm? It is doubtless to be regretted that the nature of words and the nature of things do not admit of more accurate legislation. . . . A man beset by assassins is not bound to let himself be tortured and butchered without using his weapons, because nobody has ever been able precisely to define the amount of danger which justifies homicide." 2 Macaulay Hist. Eng. 368, 369 (Am. ed. 1849).

<sup>1</sup> See *Pond v. People*, 8 Mich. 150; *Com v. Daley*, 4 Pa. L. J. 150, quoted *infra*, App.; 4 Bla. Com. 179.

<sup>2</sup> *Com. v. Riley*, Thach. C. C. 471; *Com. v. Daley*, Penn. L. J. 154; *Com. v. Drum*, 58 Penn. St. 1; *Claxton v. State*, 2 Humph. 181; *State v. Benham*, 28 Iowa, 154.

<sup>3</sup> *U. S. v. Wiltberger*, 3 Wash. C. C. 515.

<sup>4</sup> See *Pierson v. State*, 12 Ala. 149; *McPherson v. State*, 22 Ga. 478; *Floyd v. State*, 36 Ga. 91; *Chase v. State*, 46 Missis. 683; *Steward v. State*, 1 Ohio, St. 66.

<sup>5</sup> *State v. Benham*, 28 Iowa, 154; *State v. Burke*, 30 Iowa, 331; *Com. v. Drum*, 58 Penn. St. (8 P. F. Smith) 1; *Kingen v. State*, 45 Ind. 518.

<sup>6</sup> *Copeland v. State*, 7 Humph. 429.

In *Com. v. Andrews* (Pamph. 248), Chapman, C. J., said: "There is still another definition that needs to be given to you, namely, what constitutes justifiable homicide. For a question may arise here in regard to that subject. It rests upon the right of self-defence. The law regards this as a sacred right, and every man's heart justifies the principle. If an assault is made upon a man, with an attempt to commit a felony upon him, he may resist, so far as it is necessary to resist, the assailant, even if he must take the assailant's life. But this right has a limitation. If he can resist the assault and free himself without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life, in such a case he is guilty of manslaughter."

§ 481. *Necessity does not continue where the defendant retreats to a place of safety, arms himself, and then returns to renew the*

The position of the defence being that the killing was in prevention of an unnatural crime attempted by the deceased on the defendant, the chief justice, on this point, said :—

“He” (the defendant) “says his violence began when Holmes” (the deceased) “had assaulted him suddenly and unexpectedly, had thrown him down, and torn open his clothes, had seized him in a vital part, had one hand on his beard, and was proceeding to further violence. If this be true, it would excuse him for doing anything necessary to free himself, even to taking life. If all he did was to free himself from Holmes, then he committed no crime, and is entitled to an acquittal. It is not necessary for him to prove insanity, and the question of insanity becomes immaterial.

“This defence depends entirely upon your belief or disbelief of his story. Did Holmes, or did he not, make such an assault as the prisoner testifies? All the considerations already mentioned regarding the credibility of this witness bear upon this point—the prisoner’s previous good character, his kind and humane disposition; and on the other hand, the falsehoods and deceptions practised by him afterwards, and the motive he now has to testify so as to save his life.

“The age of Holmes has some bearing on the question whether he would be likely to attempt such a deed. The fact that all his clothing was found buttoned up, if that was so, has some bearing on it. The fact that the prisoner was not wounded in the contest, if that was so, has also some bearing on the question whether such an attempt was made. All the appearances of the ground, the nature of the wounds, and the instruments used

to kill the deceased, are to be considered. Do these tend to confirm the statement of the prisoner that Holmes made this felonious assault upon him, and that he was merely acting in self-defence? Or do they tend to show that the violence was all on the part of the prisoner, and that he was the assailant?

“Take these circumstances, and the prior and subsequent conduct of the defendant, and decide whether on the whole you believe his statements to be true, so that you can found a verdict upon them. If you believe his testimony, it is just to him, and just to the community, to find your verdict simply on that, with the corroboration and with the impeachment to which it is subject.

“If he was assaulted, his justification would depend upon the degree of violence with which he was assaulted. If it was like the assault which he states as having taken place when Holmes slept with him at his house, or at the Tremont House, it could hardly excite any apprehension of danger, or justify a homicide. The fact that he continued to be intimate with Holmes the jury will consider as bearing on the question whether he was afraid of violence, or had cause for fear, or whether Holmes would be likely to use any great violence upon him. The jury will regard all the circumstances that have been mentioned by counsel in regard to all these matters. I do not undertake to enumerate all the circumstances that might bear upon this question; I am not by any means referring to the whole evidence in the case.

“If the attack was not violent and did not indicate compulsion by force on the part of Holmes; if the prisoner

*conflict.* — This is a corollary of the proposition last stated. The law is well expressed by Judge King in Hare's case, already cited. It was argued by the defence that there was no cessation of the mutual firing between the combatants, from the first onslaught; that Rice (the deceased) was acting with the original assailants, armed and engaged in the firing; and that he met his death in the resistance made to the murderous assault, committed by himself and his associates, on the defendant and those united with him. "If it is true," said the learned judge, in charging the jury, "that the attack with deadly weapons on the meeting of the 7th of May was instantly returned by those unlawfully assailed; that they continued it, in order to the preservation of their own lives, which, by no other practicable and reasonable means, could have been preserved, by reason of the sudden, fierce, and deadly nature of the assault upon them; if Rice was engaged in this assault, and fell from the resistance of the assailed, rendered absolutely and indispensably necessary, from the suddenness, violence, and extent of the assault, a case of homicide in self-defence, and as such justifiable in law, has been made out, and the defendant is entitled to an acquittal. But still, if the return of the fire was not an immediate act; if the proof shows that the assaulted party retired, armed themselves, returned to the scene of original violence, and there voluntarily, and without any necessity in order to the preservation of their lives, renewed the combat, for the object of inflicting even, what they supposed, just chastisement on their opponents, the doctrine of self-defence has no relevancy to the case. The plea of self-defence rests on the natural right every man has to protect his own life against an unlawful assault upon it by another. If, however, when secure from danger, by his actual removal from the threatened assault, he voluntarily returns to meet his adversary, and renews the combat, it cannot be pretended he acts in defence of his own life against impending and inevitable destruction. He assumes,

freed himself from him and disabled him, then a continuation of the beating with stones, if it caused his death, would be manslaughter. It would not be murder because committed in the heat of blood, — the heat of blood which he describes as caused by the attack made on him, rendering him so

blind with fury that he cannot recollect what he did. If he killed Holmes in the heat of blood it would be justifiable, if he did no more than was necessary to free himself; but if he did more; if he killed Holmes after he had freed himself, it would be manslaughter."

under such circumstances, a new character. He becomes a party voluntarily entering into an unlawful conflict, and is responsible for all the consequences following his new position. You are, however, the exclusive judges of the facts of this case, and if you are of the opinion that Hare was actually present and participated in the affray that led to the death of Rice, but are satisfied from the proof that a case of excusable self-defence has been made out within the principles of law, as expounded by the court, you ought to acquit him."

§ 482. *A conflict provoked by the defendant cannot be set up by him as a defence.*—If the defendant in any way challenged the fight, and went to it armed, he cannot afterwards maintain that in taking his assailant's life he acted in self-defence.<sup>1</sup> "A man has not," as is properly said by Breese, C. J.,<sup>2</sup> "the right to provoke a quarrel and take advantage of it, and then justify the homicide."<sup>3</sup> Self-defence may be resorted to in order to repel force, but not to inflict vengeance. "Non ad sumendam vindictam, sed ad propulsandam injuriam."<sup>4</sup>

"There is certainly no law to justify the proposition that a man may be the assailant and bring on an attack, and then claim exemption from the consequence of killing his adversary on the ground of self-defence. While a man may act safely on appearances, and is not bound to wait until a blow is received, yet he cannot be the aggressor and then shield himself on the assumption that he was defending himself."<sup>5</sup>

483. *But though the defendant may have thus provoked the conflict, yet if he withdraws from it in good faith, and clearly announces his desire for peace, then, if he be pursued, his rights of self-defence revive.*—Of course there must be a real and bona fide surrender and withdrawal on his part, for if there be not,

<sup>1</sup> *Infra*, § 536, 693; *Fost.* 277; *Dock v. Com.* 21 *Grat.* 912; *Vaiden v. Com.* 12 *Grat.* 717; *Roach v. State*, 34 *Ga.* 78; *Hare's case*, *supra*. See *Hayden v. State*, 4 *Blackf.* 547; *State v. Stonecipher*, 6 *Cal.* 407; *Evans v. State*, 44 *Missis.* 762; *State v. Stoffer*, 15 *Ohio St.* 47; *State v. Starr*, 38 *Mo.* 270; *State v. Linney*, 51 *Mo.* 40; *State v. Hays*, 23 *Mo.* 493.

<sup>2</sup> *Adams v. People*, 47 *Ill.* 208.

<sup>3</sup> *Stewart v. State*, 1 *Ohio St.* 66. See also *State v. Neely*, 20 *Iowa*, 208; *Roach v. State*, 34 *Ga.* 78; *State v. Green*, 37 *Mo.* 466. See other cases cited *supra*, § 535.

<sup>4</sup> *Wh. C. L.* § 1022.

<sup>5</sup> *Wagner, J., State v. Linney*, 51 *Mo.* 40.

then he will still continue to be regarded as the aggressor.<sup>1</sup> But if A. really and evidently withdraws from the contest, and resorts to a place of security; and B., his antagonist, knowing that he is no longer in danger from A., nevertheless attacks A., then A.'s rights in self-defence revive.<sup>2</sup> Thus in an Ohio case,<sup>3</sup> where the defendant made a murderous assault upon the deceased in the street with a knife, but afterwards desisted from the conflict, declined further combat, and retreated rapidly a distance of one hundred and fifty feet, and took refuge in the house of a stranger, where he shut and held the door; but the deceased, his brother, and another immediately pursued, throwing stones at the defendant, and crying "Kill him," as he retreated; and forcibly opened the door, entered the house, and assaulted the defendant therein, and in the conflict which immediately ensued, the deceased was killed by the defendant; it was ruled by the supreme court, that while the defendant was amenable to punishment for the murderous assault with which he commenced the affray, yet he had done all that the law required him, in withdrawing from the combat and retreating to the wall before killing his adversary; and that it was hence error to give instructions and refuse others, which presented the law differently from what it is above declared to be.<sup>4</sup>

<sup>1</sup> See *Hodges v. State*, 15 Ga. 117; *State v. Hill*, 4 Dev. & B. 481.

<sup>2</sup> *Hittner v. State*, 19 Ind. 48; *Evans v. State*, 44 Missis. 762; *Evans v. State*, 33 Ga. 4; *State v. Linney*, 51 Mo. 40; *Vaiden v. Com.* 12 Grat. 717; *State v. Stonecifer*, 6 Cal. 407; *State v. Conally*, 3 Oregon, 69.

<sup>3</sup> *Stoffer v. State*, 15 Ohio St. 47.

<sup>4</sup> "It is very certain," says Ranney, J., "that while the party who first commences a malicious assault continues in the combat, and does not put into exercise the duty of withdrawing from the place, although he may be so fiercely pressed that he cannot retreat, or is thrown upon the ground, or driven to the wall, he cannot justify taking the life of his adversary, however necessary it may be to save his own; and must be deemed to have brought upon himself the necessity of

killing his fellow-man. 'For otherwise,' as said by Ch. J. Hale, 'we should have all cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*.' 1 Hale P. C. 482.

"There is every reason for saying, that the conduct of the accused, relied upon to sustain such a defence, must have been so marked in the matter of time, place, and circumstance, as not only clearly to evince the withdrawal of the accused, in good faith, from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault. But when this is made to appear, we know of no principle, however criminal the previous conduct of the accused may have been, which

§ 484. Mr. East indeed uses language which at first glance might seem inconsistent with the views which have been just

allows him to be hunted down and his life put in jeopardy, and denies him the right to act upon the instinct of self-preservation, which spontaneously arises alike in the bosoms of the just and the unjust. There is no ground for saying that this right is forfeited by previous misconduct; nor did the court below proceed upon any such idea, since the jury were charged, that if the conflict which ensued upon the first assault had ended, and a new one was made by Webb and his associates in the house, the accused, under reasonable apprehension of loss of life or great bodily harm, would be justified in taking the life of his assailant.

"The error of the court consisted in supposing that whatever might be done by the accused to withdraw himself from the contest, the conflict would never end so long as Webb made continuous efforts to prolong it. If this is a sound view of the matter, the condition of the accused would not have been bettered if he had fled for miles and had finally fallen down with exhaustion, provided Webb was continuing in his efforts to overtake him. But this view is consistent with neither the letter nor the spirit of the legal principle. A conflict is the work of at least two persons, and when one has wholly withdrawn from it, that conflict is ended; and it cannot be prolonged by the efforts of him who remains to bring on another. It is very true, that the original assault may have aroused the passions which impel the pursuer to take vengeance upon his adversary; and if death should ensue from his act, it might be entirely sufficient to mitigate the crime. But it would still be a crime, and the law cannot for a moment tolerate the execution of vengeance by private parties. If this

were allowed, such passions might be as effectually aroused by words as blows; and instead of the principle, so vital to the peace of society, that the law alone must be relied upon for the redress of all injuries, we should have avengers of injuries, real or supposed, executing their punishments upon victims stripped of all legal power, whatever might be the necessity of defending their own lives. It is needless to say, that such a course would be alike destructive to public order and private security, and would be substituting for the empire of the laws a system of force and violence.

"A line of distinction must be somewhere drawn, which, leaving the originator of a combat to the necessary consequences of his illegal or malicious conduct, shall neither impose upon him, punishments or disabilities unknown to the law, nor encourage his adversary to wreak vengeance upon him, rather than resort to the legal tribunals for redress; and we think, upon principle and the decided weight of authority, it lies precisely where we have indicated. While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case, it may be rightfully and truthfully said, that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as at the same time to manifest his own good faith, and to remove any just apprehension from his adversary, he is again remitted to his right of self-defence, and may make it effectual by opposing force to force, and, when all other means have failed, may legally act upon the instinct of

expressed: "Neither does it lie," he says, "in the mouth of a party first making a felonious attack upon another, without any lawful provocation, to urge, even in alleviation, this plea of necessity in self-defence, though perhaps it existed in fact. For if A., of malice prepense, assault B. to kill him, and B. draw his sword in his lawful defence, and attack A. and pursue him, and then A. for his own safety give back and retreat to a wall, and B. still pursuing him with his drawn sword, A. to save his own life kill B., this is murder in A. ; for A. having attacked and endeavored to kill B. upon malice in the first instance, he is answerable for all the consequences of which he was the original cause. And the attack and pursuit of B. shall not excuse him ; because it was lawful in B. to pursue A. until he was entirely out of danger,<sup>1</sup> which he could not be said to be so long as A. might renew his attack. *A fortiori*, the same rule holds if A. had merely feigned to retreat in order to give himself a color for wreaking his malice against B. It is true that Lord Hale, in treating upon this subject, puts the case that A. by malice makes a sudden assault upon B., who strikes again, and pursuing hard upon A., A. retreats to the wall, and in saving his own life kills B., which he supposes would be only self-defence, grounded upon the opinion of Dalton. But the case in Dalton is merely that of a sudden affray ; and in order to reconcile the above passage with all the other books, and with other passages of the same author, it must be understood, that he is not speaking of a felonious as-

self-preservation, and save his own life by sacrificing the life of one who persists in endangering it.

"If these views are correct, their application to the case under consideration is very obvious. Both the instructions requested and that given are based upon the hypothesis, that the accused had, in good faith and abandoning all criminal purposes, withdrawn from the combat; that he had not only retreated to the wall, but behind the wall ; and had not only gone from the view of his adversary, but to a place of supposed security from his attacks. In all this his conduct was strictly lawful. In the lan-

guage of the books, he 'had actually put into exercise the duty of withdrawing from the place.' It is very true, that the evidence tended to implicate him in a very serious crime in the first attack upon Webb, for which his subsequent conduct could not atone, and for which he was then, and still is, liable to prosecution and punishment ; but when Webb and his associates afterwards pursued and attacked him, they were wholly in the wrong, and necessarily took upon themselves all the hazards of such an unlawful enterprise."

<sup>1</sup> See also to this point *Hodges v. State*, 15 Ga. 117.

sault with malice by A., with intent to kill B., *unprepared*; but either such an assault as could no way endanger him, or, at least, upon mutual combat; and even then, if the first assault were with malice, in the legal understanding of the term, the opinion deserves further consideration, as will appear hereafter.”<sup>1</sup> Supposing the conflict to be one continuous transaction, and supposing that B.’s attack on A. was necessary in order to save B.’s life, then it is clear that Mr. East is right, and that it is murder in A., who deliberately began the conflict, to kill B. as long as the conflict continues. But suppose that the conflict is over, that A. has fled to a place of refuge, and that he has given B. every reason to understand that he really seeks peace. Everything, of course, under such circumstances, depends upon the *bona fides* of such abandonment. If B., when he knows that he is no longer in danger, should revive the quarrel, and kill A., this, supposing the attack to be malicious, would be murder in B. If this be the case, A., when subjected to such an attack, may defend himself, if it be necessary, even by taking B.’s life. For B. is attempting a capital felony, and A. has a right to prevent this even by the extremest measures.

§ 485. *Retreat is necessary when practicable.*—In cases of personal conflict, it must appear, in order to establish excusable homicide in self-defence, that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him.<sup>2</sup> The last qualification is worthy of particular consideration. “Retreated to the wall,” is sometimes given by the old text writers as the exclusive test; but even if we accept this test exclusively, we must remember that it is to be taken in a figurative sense, as indicating a retreat to the limits of personal safety. First, the word “wall” is sometimes used interchangeably with “ditch;” showing that what is meant is that when the assailed cannot further recede without exposing him to great peril (*e. g.* as in crossing a ditch), then he may turn and assume the aggressive. Secondly “walls” and “ditches” are not always accessible; and to make them prerequisites to the initiation of those offensive acts which are the conditions of self-defence would be to declare that there should be no self-defence when there are no “ditches” or “walls.” The true view is, that a “wall” is to

<sup>1</sup> East P. C. 278-9.

<sup>2</sup> 1 Hale, 481, 483.



be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to turn and attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death.<sup>1</sup>

§ 486. The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape, although he would; in manslaughter, he would not escape if he could. Thus if A. assault B. so fiercely that giving back would endanger his life, in such case it is agreed that the party thus attacked need not retreat in order to bring his case within the rule of necessity in self-defence; or if, in the assault, B. fall to the ground, whereby he could not fly; in such case if B. kill A. it is in self-defence upon chance-medley.<sup>2</sup>

As is said by Mr. East, if B., in the case already put, had returned A.'s assault so fiercely that he could not retreat without danger; or if A. had fallen to the ground, and then had killed B. who was aiming at his life, still this should not be interpreted to be done in self-defence upon chance-medley, because, it has been said, a fall not being voluntary as a flight is, it does not thereby appear that A. declined fighting; and, therefore, B. cannot safely quit the advantage he has gotten. So that in the case of the assailant there must be an actual unequivocal retreat and quitting of the combat as far as he can, in order to reduce the killing by him to self-defence upon chance-medley, and this his intention must not be shown by any ambiguous or casual act, such as his falling; otherwise, as Lord Hale observes, all cases of murders or manslaughters would by interpretation be turned into self-defences. Nor in any case will a retreat avail, if it be feigned in order to get an opportunity or interval by parting to enable him to take advantage of this excuse. If there be any pause in the conflict, or any slowness in the defendant in neglecting any opportunity to withdraw from it, the offence becomes manslaughter; for it is not to be tolerated that the plea of necessity should

<sup>1</sup> *Fost.* 273; 1 *Hawk. c.* 29, s. 14; *Bat.* 491; *R. v. Smith*, 8 C. & P. 160; 4 *Black. Com.* 185; *State v. Tweedy*, *Oliver v. State*, 17 *Ala.* 587.

<sup>2</sup> *Iowa*, 433; *State v. Thompson*, 9 <sup>3</sup> 1 *Hawk. c.* 29, s. 14; 4 *Black. Com.* *Iowa*, 188; *State v. Hill*, 4 *Dev. &* 185; 3 *Inst.* 56.

be received when that necessity was the result of the defendant's own election.<sup>1</sup>

§ 487. In *Selfridge's* case, this proposition was relied upon by the court as the main principle of law in connection with the issue; and supposing the proposition to be applied to the assailed, the law as given by the court in that celebrated trial is unquestionably sound. The objection to the charge in *Selfridge's* case, however, is, that it does not emphatically confine this right, as it should have done, to the assailed. An *assailant*, it is clear, cannot avail himself of this right to kill, whenever he is closely pressed, the person whom he assails.

§ 488. *Right of self-defence does not arise when there is opportunity to restrain the assailant by process of law.*<sup>2</sup>—It has been sometimes said that if A.'s life is made wretched by the reckless and desperate enmity of B., and if there is good reason to believe that B. is intending to assassinate A., A. is not obliged, forsaking his usual employments, to hide from B., but may arm himself, and on meeting B., shoot B. down without waiting to receive B.'s shot. No doubt, supposing a community to be without an authoritative police government, and supposing B. to be a ruffian actually seeking A.'s life, whom no other process can be used to check, then A. is excused in taking this violent but only possible way of saving his own life, by sacrificing that of B. But it is otherwise where there is opportunity to invoke the interposition of the law. A man who believes his life is in danger must, if he have access to a tribunal clothed with the ordinary powers of a justice of the peace, apply to such tribunal to interpose. If he have grounds enough to excuse him in killing the person from whom he believes himself in danger, he has ground enough to have that person bound over to keep the peace, or committed in default of bail. And wherever this process can be applied, the endangered party is not excused in taking the law into his own hands.<sup>3</sup> Where the conflict can be avoided, the law must be resorted to for redress.<sup>4</sup>

<sup>1</sup> Foster, 277; 1 Hawk. c. 29, s. 58 Penn. St. (8 P. F. Smith) 1; Dock v. State, 21 Grat. 909; Stewart v. State, 1 Ohio St. R. 66; and see supra, § 204, 413.

<sup>2</sup> See infra, § 536, 690.

<sup>3</sup> R. v. Howarth, 1 M. C. C. 207; R. v. Williams, 1 M. C. C. 387; R. v. Langdon, R. & R. 228; State v. Ruth-erford, 1 Hawks, 457; Com. v. Drum,

<sup>4</sup> People v. Sullivan, 3 Selden, 396; Shippey v. State, 10 Minn. 223.

In Com. v. Drum, 58 Penn. St. (8

§ 489. Of course the rule just stated presupposes the law gives machinery by which, if my life is threatened, I can cause the ar-

P. F. Smith), 1, Agnew, J., charged the jury, as follows:—

“To excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or at least probable, means of escaping, and that his act was one of necessity. The act of the slayer must be such as is necessary to protect the person from death or great bodily harm; and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life, or great bodily injury. If there be nothing in the circumstances indicating to the slayer at the time of his act that his assailant is about to take his life, or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal, or nearly equal strength, in taking his assailant's life with a deadly weapon. In such a case it requires a great disparity of size and strength on part of the slayer, and a very violent assault on part of his assailant, to excuse it. The disparity on the one hand, and the violence on the other, must be such as to convince the jury that great bodily harm, if not death, might have been suffered, unless the slayer had thus defended himself, or that the slayer had a reasonable ground to think it would be so. The burden lies on the prisoner, in such a case, of proving that there was an actual necessity for taking life, or a seeming one so reasonably apparent and convincing to the slayer, as to lead him to believe he could only defend himself in that way. The jury will re-

member I am speaking of wilful killing with a deadly weapon. If this intent to kill existed in the mind of the prisoner at the time of giving the blow, two difficulties arise in the case upon the plea of self-defence, which the jury must pass upon and decide.” . . . “The argument of the defence is, that when the slayer is not in fault, is not fighting at the time, or has given up the fight, and then slays his adversary, he is excusable, as in self-defence. But though this may be the case, it is not always so. The true criterion of self-defence, in such a case, is, whether there existed such a necessity for killing the adversary as required the slayer to do it in defence of his life or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of fighting him with his fists only, and where, under the circumstances, nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case it would be manslaughter; and if the deadly weapon was evidently used with a murderous and bad-hearted intent, it would even be murder. But a blow or blows are just cause of provocation; and if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant in an honest purpose of saving himself from this great harm. The right to stand in self-defence, without fleeing, has been strongly asserted by the defence. It is certainly true, that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. With-

rest of my expected assailant. Suppose, however, the law gives no such machinery? Am I to be shot down without the means of

out this freedom our liberties would be worthless. But the law does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defence and the killing of another evidently stand upon a different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die."

The assailed must retreat as far as the assault will permit. *Dock v. Com.* 21 Grat. 909; *Evans v. State*, 33 Ga. 4. In *Stewart v. State*, 1 Ohio St. 66, Judge Thurman said :—

"As to what is the precise state of the law on this subject, there is some diversity of opinion among the members of this court, and, therefore, without attempting, at this time, to lay it down, we prefer to dispose of the case upon a view which is satisfactory to us all. And we do this the more willingly, because there is not a full bench sitting upon the case. Whether a person assaulted is, or is not, bound to quit the combat, if he can safely do so, before taking life, it will not be denied that in order to justify the homicide, he must, at least, have reasonably apprehended the loss of his own life, or great bodily harm, to prevent which, and under a real, or at least supposed necessity, the fatal blow must be given. And again, the combat must not have been of his own seeking, and he must not have put himself in the way of being assaulted, in order that, when assailed and hard pressed; he might take the life of his assailant. It will also be admitted,

that in a criminal, as well as a civil cause, before the judgment can be reversed for error in the charge to the jury, it must appear that some evidence was given tending to prove a state of case in which the charge would be material. If the charge was upon a mere abstract question of law, that could not arise upon the testimony, and could not influence the decision of the jury, its character, however erroneous, furnishes no ground to reverse the sentence. And such, we are clearly of opinion, was the case under consideration."

In Kentucky the position has been pushed much further. Thus, in 1869, when the defendant Phillips, being in assumed danger of his life, shot down Miller, the deceased, whom he met "accidentally" in the road, on the supposition that Miller was about to attack him, it was declared by Judge Robertson, in giving the opinion of the supreme court, "that if the appellant had reason to apprehend and did apprehend that Miller would shoot him, unless he ran away or shot Miller first, *the law does not require him to run and be shot, perhaps in the back, or afterwards secretly assassinated, but justified his taking Miller's life.* And if he believed that Miller was drawing out a pistol to shoot him, the fact afterwards developed that Miller then had there no pistol, but was only manoeuvring to make him run, cannot make him culpable for doing what he had good reason to believe was necessary for either the immediate or ultimate security of his life." *Phillips v. Com.* 2 Duvall, 331. In 1870, a still further liberalization of the rule was attempted by the same judge, though how far with the concurrence of his associates it is difficult from the report to say.

prevention, by an assassin who will fire at me on sight? Am I to wait to receive the shot, in order to comply with the technical requisite that before I can fire an attempt should be made on my life? In a state of nature, where there is no law to which I can appeal to have such a villain restrained, I am entitled, in order to save my life, to take the law into my own hands; though I do this at my own risk! On this principle may be explained a remarkable case in California, where a party of persons were on an island belonging to the United States, engaged in gathering wild birds' eggs, and where another party attempted to land for the same purpose. It was held that if the first party resisted the landing by force, the second was justified in using force, and that if one of the occupants was killed in the encounter, this was excusable homicide.<sup>1</sup> But if there be any tribunal to which a party believing his life to be in danger may resort for protection, he must claim this protection; and for him to take the law in his own hands, and to kill a supposed assailant, unless under the honest belief of an actual attack, is murder.

§ 490. *Doctrine illustrated by Virginus case.* — An illustration of the doctrine immediately before us has been drawn by a thought-

*Carico v. Com.* 7 Bush, 124. But so far as these cases imply that a party may pursue and slay before attack, they clearly go beyond the law. The defendant must show he was attacked. And in 1871, the supreme court of Kentucky, there having been a partial change of judges, recalled the extreme views just given, and stated the law as follows:—

"When one's life has been repeatedly threatened by such an enemy" (a desperate and lawless man), "when an actual attempt has been made to assassinate, and when, after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if on such an occasion he casually meets his enemy,

having reason to believe him armed and ready to execute his murderous intention, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting." *Lindsay, J., Bohannon v. Com.* 8 Bush, 481; 1 Green's C. R. 613. See also to same effect *State v. Kennedy*, 7 Nev. 137.

<sup>1</sup> *People v. Batchelder*, 27 Cal. 69.

ful writer from *The Virginius* case.<sup>1</sup> Assuming that *The Virginius* was a Spanish vessel, engaged in war against the Spanish government, then the Spanish government, it is argued by Mr. Curtis, had the right, on grounds of self-defence as well as on the ground of its sovereignty over the offenders, to seize *The Virginius* on the high seas. "If it is true that national jurisdiction over the persons and property of subjects exists, for some purposes, wherever they are, — and this is the real basis of the relations between a national vessel at sea and the nation to which it belongs, — it follows that a nation which has subjects cruising at sea in a vessel that is wholly under their control, which has no national character, and which those subjects are using to make incipient war upon their sovereign, may have rights of prevention which depend not upon territorial but upon personal jurisdiction. Whether these rights can be exercised on the ocean, or only within the territory of the nation that needs to exercise them, depends upon the character of the ocean, upon the practicability of exercising upon it a right of self-defence without interference with the rights of others, and upon the solid reasons why such a right of self-defence should be admitted rather than denied." Supposing *The Virginius* to have been a Spanish insurrectionary vessel; it is not necessary to invoke the right of self-defence to justify its seizure by the Spanish authorities. Had *The Virginius*, however, been *primâ facie* an English or American vessel, carrying articles contraband of war to Cuba, her seizure and appropriation, on the grounds of self-defence, without resort to a prize court, cannot be justified. Mr. Curtis appeals to the case of *The Caroline*, as illustrating his position. *The Caroline*, as may be recollected, was an American vessel, which during McKenzie's rebellion in 1837-8 was used by the rebel forces to supply with arms a temporary entrenchment on the Niagara River. Navy Island belonged to Great Britain, and hence the British government had the right to attack and reduce the hostile works. *The Caroline* was trespassing on British waters when she made her visits to Navy Island; and the British government had the right to seize and destroy her when engaged on such visits. Instead, however, of exercising this right, a party of British troops, on the night of December 29-30, 1837,

<sup>1</sup> The Case of *The Virginius* considered with reference to the Law of Self-defence, by Mr. Geo. T. Curtis. N. Y.: Baker & Voorhis, 1874.

under the command of Col. Allen McNabb, attacked *The Caroline*, which was found attached to the dock at Schlosser, a port of the State of New York, cut her out from her moorings, and after setting her on fire, sent her over the Falls of Niagara. Her crew were discharged from the vessel, but in the scuffle, Amos Durfee, one of the hands of the vessel, was killed. Early in 1841, Alexander McLeod, a British subject, one of those concerned in attacking *The Caroline*, being found within jurisdiction of New York, was indicted for murder by the grand jury of Niagara County, New York. On March 12, 1841, Mr. Fox, British minister at Washington, applied to Mr. Webster, then secretary of state, for the release of McLeod, on the ground that he was acting in *The Caroline* matter under the direction of "Her Majesty's colonial authorities;" and that McLeod and his associates, when engaged in that transaction, were performing an act of public duty, for which "they cannot be made personally and individually answerable to the tribunals of a foreign country." While this demand was pending, a *habeas corpus* was sued out by McLeod before the supreme court of New York. In his affidavit, accompanying his petition, occurs the following paragraph:—

"That, as deponent has been informed and believes to be true, the act of destroying the said steamboat *Caroline*, together with the manner in which the same was done, and the conduct of the persons engaged in it, including the killing of the said Durfee, have since been approved and adopted by the national government of Great Britain, as a necessary act of self-defence, on the part of the authorities of the Province of Upper Canada. And that, as this deponent has been informed and believes to be true, the federal government of the United States, immediately after the destruction of *The Caroline*, opened a correspondence with the government of Great Britain in relation thereto, and demanded reparation therefor, and that said correspondence has not yet been brought to a close."

The supreme court refused, on the case thus made out, to discharge the prisoner. The opinion of the court was given by Cowen, J., who argued the question of self-defence as follows:—

"But admitting that England might protect a man against our jurisdiction, by saying he did a public act under her authority, does it not behoove her at least to show that she has acted

within the limits of her own jurisdiction, especially where she has prescribed them to herself? Shall her declaration enure to deprive us of power where she is exceeding her own? And this brings me to inquire whether the transaction in question be such as any national right, so far examined, can sanction. She puts herself, as we have seen, on the law of defence and necessity; and nothing is better defined nor more familiar in any system of jurisprudence than the juncture of circumstances which can alone tolerate the action of that law. A force which the defendant has a right to resist must itself be in striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The rights of self-defence and the defence of others standing in certain relations to the defender, depend on the same ground; at least they are limited, by the same principle. It will be sufficient, therefore, to inquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone, 3 Bla. Com. 4, that to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. 'But,' he adds, 'care must be taken that the resistance does not exceed the bounds of *mere defence* and *prevention*; for then the *defender* would himself become the *aggressor*.' The condition upon which the right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition, or those limits. *The Caroline* was not in the act of making an assault on the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever they could find her, and were, in fact, obliged to sail half the width of the Niagara River, after they had entered our territory, in order to reach the boat. They were the assailants; and their attack might have been legally repelled by Durfee, even to the destruction of their lives. The case made by the affidavit is, in principle, this: A man believes that his neighbor is preparing to do him a personal injury. He



goes half a mile to his house, breaks the door, and kills him in his bed at midnight. On being arraigned, he cites the law of nature; and tells us that he was attacked by his neighbor, and slew him on the principle of mere defence and prevention; or, in the language of the plea of *son assault demesne*, 'he made an assault upon me, and would then and there have beat me, had I not immediately defended myself against him; wherefore I did then and there defend myself as I lawfully might for the cause aforesaid; and, in doing so, did necessarily and unavoidably beat him, doing him on such occasion no unnecessary damage. And if any damage happened, it was occasioned by his assault and my necessary defence.'

"To excuse homicide in self-defence, says another English writer, the act *must not be premeditated*. He must first retreat as far as he safely can, to avoid the violence threatened by the party whom he is obliged to kill. The retreat must be with an honest intention to escape; and he must flee as far as he conveniently can by reason of some impediment, or as far as the fierceness of the assault will permit him, and then in his defence, he may kill his adversary. 1 Russ. on Cr. 544.

"Such is the law of mixed war on neutral ground. The books cited are treating of no narrow, technical rule peculiar to the common law; but the law of nature and of nations, the same everywhere, of such paramount force as no municipal or international law could ever overcome, and intelligible to every living soul. It is easily applied, both as between individuals in civil society and nations at peace. Passing the boundary of *strict*, not fancied necessity, the remedy lies in suit by the state or citizen whose rights have been violated, or by demanding the person of the mischievous fugitive who has broken the criminal law of a foreign sovereign. Accordingly, Puffendorf, after considering the rights of private war in a state of nature, adds: 'But we must by no means allow an equal liberty to the members of civil states. For here, if the adversary be a foreigner, we may resist and repel him any way, at the instant when he comes violently upon us. But we cannot, without the sovereign's command, either assault him whilst his mischief is only in machination, or revenge ourselves upon him after he hath performed the injury against us. Puf. b. 2, ch. 5, § 7. The sover-

eign's command must, as we have seen, in order to warrant such conduct in his subject, be a denunciation of war."

In recurring to the question of self-defence, Judge Cowen, in a subsequent portion of his opinion, says : " But, above all things, it is important in the latter case for the jury to inquire whether his allegation of defence be not false or colorable. They cannot allow as an act of defence the wilful pursuing even such an enemy, though dictated by sovereign authority, into a country at peace with the sovereign of the accused, seeking out that enemy and taking his life. Such a deed can be nothing but an act of vengeance. It can be nothing but a violation of territory—a violation of the municipal law, the faith of treaties, and the law of nations. The government of the accused may approve, diplomacy may glose, but a jury can only inquire whether he was a party to the deed, or to an act of illegal violence, which he knew would probably endanger human life."

The question which the destruction of *The Caroline* brings up is, whether the right of self-defence excuses a sovereign in attacking a hostile armament within the lines of a foreign state with whom he is at peace. There can be no doubt that in cases of necessity this right is reserved to nations as fully as to individuals. The Roman law, as we have seen, is distinct to the effect that this right is one which is based on natural law, recognized by all nations.<sup>1</sup> " Ut vim atque injuriam propulsemus, juris gentium est." " Vim vi repellere licet; idque jus natura comparatur." Hence, if necessity existed, in *The Caroline* case, the British government was justified in sending an expedition to destroy her, and to use any degree of violence necessary for this purpose; and in such case neither would the United States government have had just ground of complaint, nor could those engaged in such an act of excusable violence been justly convicted of the same in any court of New York, even supposing that the avowal of the British government of the act would not itself have transferred the quarrel to that government. But was the attack of *The Caroline*, when in the port of Schlosser, a necessary act of self-defence? It is admitted that the British government would have been justified in destroying her had she been caught on British waters; *a fortiori* had she been at the time of the destruction engaged in a movement hostile to Great Britain. It

<sup>1</sup> See *supra*, § 480.

is admitted, also, that had there been no other way of destroying her, the invasion of the territory of the United States, and any other acts of violence essential to such destruction, would have been excusable. But was this necessary? Certainly it was, if there was no other way of preventing the visits of *The Caroline* to Navy Island. My house, for instance, is threatened by a burglar, who is lurking in a neighboring village. Can I go to that village, surprise him with a superior force, and there kill him? Certainly I can, if I have no other way of preventing an apparently imminent attack from him. But is there no other way of preventing such attack? In a community that is without courts of justice, no doubt this method of anticipating an attack, and thus crippling and destroying the assailant, is excusable. On this principle may be sustained the forays of the Middle Ages, and those of the Scotch clans as late as the reign of William III., which were organized for the punishment of supposed criminals, and which, sometimes in anticipation of attack, sometimes in punishment, hunted out the offender in his retreat. On this principle, also, may be perhaps excused those summary acts of prevention or of indemnity by which, in the comparatively unsettled portions of our western territory, the lack of legal machinery is supplied by the voluntary action of individuals. But this right does not exist, as we have just seen, when there is a court to appeal to. My life, in a state subject to ordinary police government, is threatened by a particular person. Can I seek out that person in his own home, and there, when he is unarmed and unwarned (as was the case of *The Caroline* at Schlosser), destroy him? I certainly cannot excuse myself, on the plea of self-defence, in so doing, if there is a justice of the peace to whom I may have recourse, who, upon proper ground laid before him, has authority to bind over my supposed assailant to keep the peace. In other words, under a settled government, with the ordinary police apparatus, common both to England and the United States, the right of self-defence can only be exercised in cases where the danger cannot be averted by due interposition of law. To deny this principle would be to expose society to destruction from private raids.<sup>1</sup>

<sup>1</sup> The Justinian Code in this respect all modern jurisprudences. The right presents a qualification which has been of self-defence is permitted by *omnes* adopted, as based on right reason, by *leges et omnia jura; tamen id debet fieri*

§ 491. If this be true in private affairs, there is no reason why the same rule should not be applied to affairs public and national. We cannot deny, for instance, that the right of self-defence justifies, when there is no other remedy, violent resistance to government; but to attempt violently to resist government, in any case where the unlawful act complained of could be redressed by an appeal to law, makes the person so resisting responsible for any damage done by his resistance. If this be the case, still more strongly must we hold that a merely threatened danger will not excuse, unless all legal or constitutional modes of redress should fail, a forcible attack upon the authority that threatens. Mr. Fox touches this point when he discusses the execution of Charles I. "Mr. Hume," he says, "not perhaps intentionally, makes the best justification of it, by saying that while Charles lived, the projected republic could never be secure. *But, to justify taking away the life of an individual, upon the principle of self-defence, the danger must be, not problematical or remote, but evident and immediate.*" It is true that this proposition is subject to some qualification when applied to trials for high treason; for, supposing that the parliamentary government that condemned Charles was the supreme authority of the state, then Charles might have been convicted of treason to that authority without in any way infringing on the maxim as thus stated. There is no question, however, as to the applicability of the maxim in its full force to those cases in which a government seeks to maintain its existence against the assaults of insurgents. "If you have wrongs to redress, go to the courts or the legislature. As long as courts or legislatures, competent to redress your alleged wrongs, exist, no necessity can be set up to excuse you in acts of violence against the state."

§ 492. Equally essential to the peace and welfare of nations is it that no sovereign, except in case of necessity, should be permitted to invade the soil of another in order to destroy a rebel force. If this right be conceded, the inviolability of natural sovereignty would be destroyed, and the citizens of each particular state, instead of being as subjects exclusively responsible to their own sovereign prince, would be liable to be arrested, and either killed at their own firesides by military law, or trans-

*cum moderamine inculptae tutelae, non sandum injuriam.* Wharton's C. L.  
*ad sumendam vindictam, sed ad propul-* § 1022.

ported, and convicted in a foreign land. But this right cannot be conceded, nor is it now claimed by any civilized sovereign as against a civilized state. The only question is as to what limits are assigned to the exceptions of necessity. And here must we say, following the analogy of cases of private self-defence, that no necessity exists where there can be any redress by process of law. If the British government did not choose to wait until *The Caroline* made her next daily incursion in English waters, they should have applied to the government at Washington to interpose. No such application, however, is pretended in the affidavit and petition of McLeod, when applying for a release to the supreme court of New York. On the face of the papers, therefore, Judge Cowen's argument is sound. There was no necessity which excused the invasion of the territory of the United States in order to capture *The Caroline*.<sup>1</sup>

§ 493. *Whether the danger is apparent is to be determined from the defendant's stand-point.* — Here, no doubt, we arrive at a point where begin marked divergences of judicial sentiment. It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable, and actual. But apparently as to whom? Here three theories meet us: The first is, that the stand-point is that of the jury.<sup>2</sup> No doubt, in a primary sense, this is correct. The jury must judge whether the danger was apparent, but it is absurd to say that it is necessary that the danger must have been such as to be apparent to themselves as they deliberate finally on the case. If this were true, an unloaded pistol would cease to be an apparent danger, for the jury, when they come to decide the case, know that the pistol was not loaded, and know that there was no real danger. Hence, what the jury have to decide is, not whether the danger was apparent to themselves, but whether it was ap-

<sup>1</sup> For an interesting communication, opposing the conclusions of the text, see Central Law Journal, June 18, 1874. The decision of the court in McLeod's case may be justly cited as an additional authority for the position that the right of self-defence does not excuse a homicide when the attack is not apparently imminent and

immediate, and when there is an opportunity of resorting to the law to avert the threatened danger.

<sup>2</sup> See *Schnier v. People*, 23 Ill. 17; *Meredith v. Com.* 18 B. Monr. 49; *Wesley v. State*, 37 Missis. 327; *Evans v. State*, 44 Missis. 762; *U. S. v. Wiltberger*, 3 Wash. C. C. 515.

parent by some other standard. What is the other standard which the jury are thus to apply?

The answer given by several of our courts to this question is, that if a "reasonable man" would have held that the danger was apparent, then the danger will be treated as apparent. In other cases it is varied; it being said that when the danger is "reasonably apparent," then it is to be treated as apparent. We are therefore to infer that if a man of ordinary reason would consider an apparent though unreal danger to be imminent and real, then this is a good defence; but that to constitute a good defence it is necessary that the danger should have been such as to have been considered as imminent and real by a man of ordinary reason.<sup>1</sup>

§ 494. *Impracticable to take an ideal "reasonable man" as standard.* But who is the "reasonable man" who is thus invoked as the standard by which the "apparent danger" is to be tested? What degree of "reason" is he to be supposed to have? If he is a man of peculiar coolness and shrewdness, then he has capacities which we rarely discover among persons fluttered by an attack in which life is assailed; and we are applying, therefore, a test about as inapplicable as would be that of the jury who deliberate on events after they have been interpreted by their results. Or, if we reject this idea of a man of peculiar reasoning and perceptive powers, the selection is one of pure caprice, the ideal rea-

<sup>1</sup> As illustrating this view may be cited an opinion pronounced in 1864 by the supreme court of North Carolina. *State v. Bryson*, 1 Winst. Law, Pt. ii. 86.

"A right," says Manly, J., "to act in self-defence does not depend upon the special state of mind of the subject of the inquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinarily sound and healthy state; and whatever may be his personal apprehensions, if he has not reasonable ground to support them, he will not be protected by the principle of self-defence. The normal condition of the human passions and faculties must be regarded in establishing rules for the gov-

ernment of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what these ought to have been, when measured by a standard derived from observation of men of ordinary firmness and reflection. This is what is called reasonable ground of belief, and is the rule for judging of a case of self-defence, upon an indictment for an assault and battery. Therefore, a prayer for instructions, which assumed that one's personal feelings and apprehensions, however eccentric and morbid these might be, determined the character of his conduct, was properly refused."

sonable man being an undefinable myth, leaving the particular case ungoverned by any fixed rule. And that this ideal reasonable man is an inadequate standard is shown by a conclusive test. Suppose the ideal reasonable man would at the time of the conflict have believed that a gun aimed by the deceased was loaded, whereas in point of fact the defendant knew the gun was not loaded; would the defendant be justified in shooting down an assailant approaching with a gun the defendant knows to be unloaded, simply because the ideal "reasonable man" would suppose the gun to be loaded? No doubt that in such case no honest belief of the ideal reasonable man would be a defence to the defendant who knew that the belief was false, and that he was not really in danger of his life. And if the belief of the ideal reasonable man is not admissible to *acquit*, *a fortiori* is it inadmissible to *convict*.

§ 495. *Ambiguity of authorities cited to this effect.*— But it must be observed that several cases which have been cited to sustain the position that the reasonableness of the defendant's apprehension is to be determined by an abstract standard and not by that of the defendant's particular lights, do not actually touch the point to which they are cited.

§ 496. Thus we find Wilson, C. J., in the Minnesota supreme court, expressing himself as follows: <sup>1</sup> "It is not enough that this party believed himself in danger, unless the facts and circumstances were such that the jury can say that he had reasonable grounds for his belief."

This is no doubt good law; for a man's belief, that certain facts exist, when, if he had exercised due diligence, he would have known that such facts did not exist, is no defence. To make an error of fact a defence it must be reasonable, *i. e.* it must not be attributable to negligence. But reasonable to whom? To a stranger? To an ideal person? Certainly not. It is the defendant whose diligence or negligence is to be the test of his *bona fides*. But whether the defendant or the ideal "reasonable man" is the standard, Wilson, C. J., does not here say. He simply declares that the defendant must have "reasonable grounds for his belief." And we have a right to suppose that the "reason" referred to is the reason of the defendant himself.<sup>2</sup>

<sup>1</sup> State v. Shippey, 10 Minn. 223. Wharton's Cr. Law, 386; a work which

<sup>2</sup> He cites as one of his authorities assumes throughout that the standard

§ 497. So Chief Justice Breese tells us in Illinois<sup>1</sup> that the "doctrine established by this court" is "that a man threatened with danger must determine from appearances and the actual state of things surrounding him as to the necessity of resorting to self-defence; and if he acts from reasonable and honest convictions, he will not be responsible, criminally, for a mistake, as to the extent of the actual danger, where other judicious men would have been alike mistaken."<sup>2</sup> But does this mean "judicious men" acting with the defendant's lights, or ideal judicious men? If we take the first of these constructions, the expressions of Ch. J. Breese are, what they would not otherwise be, consistent.

The same criticism is applicable to a Louisiana opinion where it was declared that the killing is excusable when the assailed had "reasonable ground to apprehend" either vital or serious bodily injury;<sup>3</sup> and to an opinion in Florida, where it is said "the belief must be reasonable; there must be reasonable ground to apprehend a design to take away life, or to do great bodily harm, and reasonable ground for believing the danger imminent that such design will be accomplished then."<sup>4</sup>

§ 498. So also may we interpret the language of Bosanquet, J., when charging a jury in a case in which he was associated with Bolland, B., and Coltman, J.: "Before a person can avail himself of that defence, he must satisfy the jury that the defence was necessary; that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect him from such serious bodily harm as would give a *reasonable apprehension* that his life was in immediate danger."<sup>5</sup> Nothing is here said as to whether this reasonableness is to be according to the defendant's lights, or those of another person, or of an ideal reasonable man. The same remark is to be made as to a charge by Holroyd, J., in an indictment against an officer for killing a prisoner charged with a misdemeanor,<sup>6</sup> where that learned judge said: "If the prisoner had *reasonable ground* for believing himself to be in peril of his own life, . . . then he was justified."

in all questions of error of fact is the defendant's capacity and diligence.

<sup>1</sup> Adams v. People, 47 Ill. 208.

<sup>2</sup> See also Schnier v. People, 28 Ill.

17.

<sup>3</sup> State v. Swift, 14 La. An. 827.

<sup>4</sup> Gladden v. State, 12 Fl. 562.

<sup>5</sup> R. v. Smith, 8 C. & P. 160.

<sup>6</sup> R. v. Forster, 1 Lewin C. C. 187.



§ 499. Other cases exist in which a standard outside of the defendant is apparently set up, but in which the view actually taken is that the standard is to be the defendant's own consciousness; but that, as is elsewhere shown, if his error of fact is attributable to his own negligence, and if his apprehension of danger springs from this error in fact, then he is guilty of negligent homicide, that is of manslaughter.

To this effect may be cited the argument of Frazer, J., in the supreme court of Indiana: "It ought to be borne in mind, that the criminal law holds sane men responsible for the ordinary exercise of their reason. It is a power common alike to cowards and those who know no fear. It is a guide to which both may apply if they wish to do so. By the power of will, he who is naturally very timid can, and often does, meet danger with as much self-possession as the boldest man, and even his fears beget that caution which is a necessary safeguard against rashness. Of all men, he is probably least likely to commit needless homicide in self-defence, for his unfortunate weakness usually tends to paralyze his arm, and makes him slow to strike, quite as much as it subjects him to the torture of groundless apprehension. Of course we speak of persons not so unmanned by fear as to be incapable of exercising either judgment or will. A sane man is so constituted that he can be either the master or the slave of his fears, as well as his passions. The criminal law, indulging to a humane extent the mere infirmities of human nature, nevertheless requires the exercise of this mastery."<sup>1</sup> There can be no question that this is good law. But there can be no question, also, that a person, who kills another from a negligent error in fact, no matter to what this negligence is attributable, is not, if he believes himself acting in self-defence, and has no malice, guilty of murder. The offence is but manslaughter.

§ 500. The same idea underlies the opinion of Bronson, J., in a case often appealed to as authoritative in this branch of the law.<sup>2</sup> He begins as follows: "When one who is without fault himself is attacked by another in such a manner, or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent

\* <sup>1</sup> *Creek v. State*, 24 Ind. 151.

See this case approved in *Morris v.*

<sup>2</sup> *Shorter v. People*, 2 Comst. 193. *Platt*, 32 Conn. 75.

that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger ; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was *in fact* neither design to do him serious injury nor danger that it would be done. He must decide, at his peril, upon the force of the circumstances in which he is placed ; for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence, had they proved true."

After citing Selfridge's case, he goes on to say : "The Massachusetts case lays down no new doctrine. The same principle was acted on in Levett's case, recited by Jones, J., in Cook's case, Cro. Car. 588, to the following effect: Levett was in bed with his wife, and asleep, in the night, when the servant ran to them in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife espying some one whom she knew not in the buttery, cried out to her husband, in great fear, 'Here they be that would undo us.' Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting with his rapier before him, killed Frances Freeman, who was lawfully in the house and wholly without fault. On these facts, found by special verdict, the court held that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here the defendant acted upon information and appearances which were wholly false ; and yet as he had reasonable grounds for believing them true, he was held guiltless. Foster (Crown Law, p. 299) says of this case : '*Possibly it might have been better ruled manslaughter at common law, due circumspection not having been used.*' I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in Levett's case ; and most of them have fully approved it. East, in his Pleas of the Crown, vol. 1, p. 274, 275, has done so. Hale (1 P. C. 42, 474) mentions it among cases where ignorance of the

fact will excuse from all blame. Hawkins (1 P. C. 84, Curwood's ed.) says the killing had not the appearance of a fault. Russell (On Crimes, vol. 1, p. 550 ed. of 1836) approves the decision, which he introduces with the remark that "important considerations will arise in cases of this kind [he was speaking of homicide in defence of one's person, habitation, or property], as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. Roscoe (Crim. Ev. p. 639) says: 'It is not essential that an actual felony should be about to be committed, in order to justify the killing. If the circumstances are such as that, *after all reasonable caution*, the party suspects that the felony is about to be immediately committed, he will be justified.' And he then gives Levett's case as an example.

"The case of Sir William Hawkesworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle. 1 Hale P. C. 40; 1 East P. C. 275; 1 Russ. on Cr. 549. Other cases are put in the books, where the killing will be justified by appearances, though they afterwards prove false. A general, to try the vigilance or courage of his sentinel, comes upon the sentinel in the night in the posture of an enemy, and is killed. There the ignorance of the sentinel that it was his general and not an enemy, will justify the killing. 1 Hale P. C. 42; 1 East P. C. 275; 1 Russ. 540. The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn, in obedience to his master's orders, belongs to the same class. 1 Hale P. C. 40, 476; 1 Russ. 540. In Rampton's case, Kelyng Rep. 41, the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as he had supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster (Crown Law, 263-4) calls this a hard case, and thinks the man should have been wholly acquitted, *on the ground that he exercised due caution*, — the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still the case goes on the ground

that the degree of guilt may be affected by appearances which afterwards prove false; for if he had not tried the pistol, it would have been murder. Foster (p. 265) mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge being of opinion that the *prisoner had reasonable ground to believe that the gun was not loaded*, directed the jury, that if they were of the same opinion, they should acquit the prisoner, and he was acquitted. In Meade's case, 1 Lewin's Cr. Cas. 184, the prisoner had killed with a pistol one of a great number of persons who came about his house in the night-time, singing songs of menace, and using violent language. Holroyd, J., told the jury, that if there was nothing but the song, and no *appearance* of violence — if they believed there was no *reasonable ground* for apprehending danger, the killing was murder. And in *The People v. Rector*, 19 Wend. 569, Cowen, J., said, alarm on the part of the prisoner, *on apparent, though unreal* grounds, was pertinent to the issue. In *The United States v. Wiltberger*, 3 Wash. C. C. 515, 521, the judge told the jury, that for the purpose of justifying the killing, the intent of the deceased to commit a felony must be *apparent*, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added, that the danger must be imminent, meaning undoubtedly that it must wear that appearance. *The State v. Wells*, 1 Coxe N. J. Rep. 424, is entirely consistent with this doctrine. The supreme court of Tennessee has gone still farther, and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground in the appearances, for the killing. *Grainger v. The State*, 5 Yerger, 459. This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say *he had reasonable grounds for his belief*."

§ 501. But by whose lights are these "reasonable grounds of belief" to be tested? By the defendant's, we must conclude, if we closely scan the following passage, with which Judge Bronson closes this part of his argument: "If it was not murder, it was manslaughter at the least; and so far as relates to these offences, no exception was taken to the charge. When a man is struck

with the naked hand, *and has no reason to apprehend a design to do him any great bodily harm*, he must not return the blow with a dangerous weapon." It is the defendant's reason, therefore, that is appealed to as the test. Yet it must be the defendant's reason acting *diligently* and not *negligently*. He is wielding a dangerous instrument; and if he wields this negligently, — if he wields it sincerely on the basis of an error of fact which he has negligently adopted, — then he is liable for the consequences. His liability, however, is not for murder, in case of death resulting from his negligence, but manslaughter. And this is evidently the distinction taken by Foster and Roscoe in the cases cited by Judge Bronson.

§ 502. Again, we find Edmonds, J.,<sup>1</sup> saying that "the homicide would be justifiable under our law (the New York statute introducing the term 'reasonable' as the general test), only in case it was committed by the prisoner when there was reasonable ground to apprehend a design to do him some great personal injury, and there was imminent danger of such design being accomplished. But of this the jury were to be the judges, not the prisoner; and it was for them to say, from all the circumstances proved before them, whether there was reasonable ground for such apprehension, and whether there was, at the moment the fatal shot was fired, imminent (apparent should be here inserted) danger that some great personal injury would be done to the prisoner." But from what stand-point are the jury to judge? Certainly not from that of themselves, as they sit in the jury box, for this would be to do away with the qualification "apparent." From that of the ideal reasonable man? But the ideal reasonable man, in the great range of capacity assignable to that imaginary personage, might be supposed to see as clearly as did the jury, after the facts were all disclosed, that the danger was only apparent and not real. From that of the defendant? This brings us back to the doctrine of the text.

§ 503. The same ambiguity exists in the following expressions in an opinion of Ruffin, C. J., in a case decided in 1844 by the supreme court of North Carolina.<sup>2</sup> "The belief," says this ex-

<sup>1</sup> *People v. Austin*, 1 Parker C. R. 154. See also *Schnier v. People*, 23 Ill. 17; *Meredith v. Com.* 18 B. Monr. 49; *Wesley v. State*, 31 Missis. 327; *Evans v. State*, 44 Missis. 762; *U. S. v. Wiltberger*, 3 Wash. C. C. 515. <sup>2</sup> *State v. Scott*, 4 Ired. 409.

cellent judge, "that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. Here there certainly was no such purpose then in the mind of the deceased, as he had no weapon of any sort. Nor did the prisoner have any just reason to think the deceased so designed then; for although it was night, yet it was bright starlight, so that all the company could see each other distinctly, and the prisoner must have seen that the deceased was not armed, or that, at least, he did not appear to be armed. The most then that could be made of it would be, that the prisoner may have thought that the deceased might be armed, and, therefore, that he might then intend to kill him. But such a remote conjecture will not authorize one man to kill another. There might have been more in it if the deceased had been lurking on the way of the prisoner, in the dark, where he could not tell whether he was armed or not, but might presume from his ill-will towards him and the situation in which he was found that he was. But it cannot apply to a case where there is light enough for the parties to know each other, and upon a mutual quarrel they begin a fight, in which neither party appears to be armed, and one of them secretly prepares a deadly weapon, with which he assails and kills the other, who in reality was, as he appeared, not armed. Besides, the prisoner did not allege in his defence that he believed at the time that the deceased intended to kill him, and under that belief he slew him." Daniel, J., in dissenting, adopts the same expressions as to the point immediately before us. "From this evidence the prisoner was guilty of murder by malice implied in law, unless he had a *reasonable ground to believe* that a felony was intended and about to be committed on him by the deceased. If he then had such a reasonable ground of belief, although it turned out in fact that no felony was intended by the deceased, still it was not in law a case of murder. East's P. C. ch. 5, § 46; 1 Hale, 470; Foster, 299. Notwithstanding this was the only ground of defence the prisoner had, the court did not, as far as we can learn from the case sent up here, inform the jury that such was the law, nor does it appear that the court said one word to the jury upon this, the only possible ground the prisoner had to escape

the charge of murder. The jury, it seems, were left entirely uninformed and in the dark, as to the law on this point of the case. And whether the prisoner had then a reasonable ground to believe the deceased meant to take his life was a matter of fact *for the determination of the jury.*" "For the determination of the jury" is the position as to which all agree. But by what standard — that of the defendant's capacity, or that of an ideal "reasonable man?"

§ 504. *And so of several penal codes.* — The penal codes of many of the states exhibit the same ambiguity. The "fear," it is declared, in language substantially the same, though with incidental variations, must be the "fear of a reasonable person," or must be a "reasonable fear," and the killing must have been "under the influence of these fears," and "not in revenge." So it is presented by statute, though in language exhibiting much diversity, in New York,<sup>1</sup> California,<sup>2</sup> Arkansas, Illinois, Georgia, Kansas,<sup>3</sup> Mississippi,<sup>4</sup> and Minnesota.<sup>5</sup> But in no statute do we find a determination of the question whether this "reasonableness" is to be tested by the defendant's lights, or those of an ideal reasonable man. Undoubtedly, courts have read the statutes so as to include the latter view.<sup>6</sup> But this is not a necessary implication of the statutes, which leave it open to determine in what way the term reasonable is to be defined.

§ 505. *Cases holding that the danger must be apparent to the defendant, and that it is sufficient if it be so.* — The leading maxim on this point is one which Mr. Broom, in his *Legal Maxims*, tells us Lord Erskine relied on as of controlling importance, and which is adopted in a well known opinion of Baron Parke:<sup>7</sup> "The rule of law founded in justice and reason is, that *actus non facit reum, nisi mens sit rea*; the guilt of the accused must depend upon the circumstances as they appear to him." To the same effect may be cited the following expressions of Garrow, J.,

<sup>1</sup> 2 R. S. 660, § 3, sub. 2, declared by Bronson, J., *Shorter v. People*, 2 Comst. 193, to be only declaratory of the common law.

<sup>2</sup> *People v. Hurley*, 8 Cal. 390; *People v. Williams*, 32 Cal. 280.

<sup>3</sup> Gen. Stat. 1868, p. 319.

<sup>4</sup> *Dyson v. State*, 26 Miss. 762.

<sup>5</sup> Stat. 1867, p. 598. I am indebted for these citations to Hor. & Thomp. Cas. p. 268.

<sup>6</sup> See *People v. Williams*, 32 Cal. 280; *People v. Austin*, 1 Parker C. R. 154; cited supra, § 502.

<sup>7</sup> R. v. Thurborn, 1 Den. C. C. 388-9.

in a much earlier case:<sup>1</sup> "Here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man who was only a trespasser, he would be guilty of manslaughter."

§ 506. *Pennsylvania*.—This test has been maintained, with only slight occasional and probably inadvertent departures, by the Pennsylvania courts. It was uniformly applied in all homicide cases by Judge King, a great master of criminal law.<sup>2</sup>

Following Judge King's lead, we find Judge Brewster, afterwards presiding in the same court, declaring<sup>3</sup> that "The attack must have been such *as in the belief of the prisoner* rendered it necessary to defend himself, even to the taking of the life of the deceased."

To the same effect may be cited an opinion of the late lamented Chief Justice Thompson, of Pennsylvania, speaking for the whole supreme bench of that state.<sup>4</sup> From this opinion the following passages may be extracted:—

"In treating of excusable homicide, Wharton, in his valuable work on Criminal Law, in § 1021, says: 'The assault may have been so fierce as not to allow him (the slayer) to yield a step without manifest danger of his life, or enormous bodily harm; and then in his defence, if there be no other way of saving his own life, he may kill his assailant instantly.'

"This is the principle of all the books, in case of actual danger.

"After treating of many aspects of self-defence under such circumstances, in § 1026, same book, another rule is given: '*If the apprehension of an immediate and actual danger to life be sincere, though unreal, it is in like manner a defence*;' and, it is added, 'Although this proposition, in its present shape, has been accepted with great reluctance, and in very recent times by the courts, and should be always applied with extreme caution, it has at all periods been practically recognized.'

"And Levett's case, Cro. Charles, 488, is cited. That was a case where an alarm having been given by a servant that there

<sup>1</sup> R. v. Scully, 1 C. & P. 319.

<sup>2</sup> This view runs through the charges of this great jurist in the homicide cases growing out of the riots of 1844-5, as given in prior pages. It was accepted by him, as a matter of

unquestioned law, in Flavel's case, cited in Wharton's Crim. Law, § 1027.

<sup>3</sup> Com. v. Carey, 2 Brewster, 401. See supra, § 506.

<sup>4</sup> Logue v. Com. 2 Wright, 265.



were robbers in the house ; the defendant, with a drawn sword in his hand, slew a servant girl of the neighborhood, who, being lawfully in the house at the time, concealed herself in the buttery, to avoid being seen by him. This was held to be excusable homicide by misadventure. So in the case of Sir William Hawkesworth, who was killed by his game-keeper, mistaking him for a deer-stealer. These are old cases.

“ The principle of reasonable apprehension was laid down by the learned judge in Selfridge’s case, to be found in Russ. on Cr. p. 485.

“ So it has been held in the State of New York in *The People v. Shorter*, 4 Barb. 460, and affirmed in the court of errors and appeals, 2 Comst. 197 — opinion by Bronson, J. There the principle is thus stated : ‘ Where one who is without fault is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger ; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither a design to do him serious injury, nor danger that it would be done.’

“ True, there is a statute on the subject in New York, but it has been held in many cases to be only declaratory of the common law. The same principle may be found decided in the *State v. Green*, 4 Ired. (N. C.) 409. So in Ohio, in *Stewart v. The State*, 1 McCord’s Rep. 71. So in *Oliver v. The State*, 17 Ala. 587. The case of *The Commonwealth v. Seibert*, Luzerne Co. 1852, cited with approbation in Wharton on Hom. 227, at length, is to the same effect.

“ We might multiply authorities to sustain the accuracy of the point, but it is not necessary.

“ I take the rule to be settled, that the killing of one who is an assailant must be under a reasonable apprehension of loss of life or great bodily harm, and the danger must appear so imminent at the moment of the assault as to present no alternative of escaping its consequences but resistance. Then the killing may

be excusable, even if it turn out afterwards that there was no actual danger.”<sup>1</sup>

§ 507. Now what is the principle of *Com. v. Seibert*, indorsed by Chief Justice Thompson, speaking for the supreme court of Pennsylvania, as being to “the same effect” with the views expressed by them in *Logue’s case*? As I recur to the opinion in *Seibert’s case*, I cannot omit paying a brief tribute to Judge Conyngham, by whom it was pronounced, whose death occurred since the last edition of this work was published, and to whose eminent virtues and sound legal judgment the opinion in question owed much of its authority. He was not only an excellent lawyer, but he possessed to an almost unexampled degree the confidence of the community in which he lived and of the state of which he was an ornament; and this confidence he won by his industry, his sound and clear judgment, his exquisite courtesy, his integrity, his unsullied honor, and his high Christian tone. It has frequently been said that the qualification of the law of imputability here defended springs from loose views of guilt, and is adapted to a state of society in which human life is lightly revered. No such views could have been attributed to Judge Conyngham. His standard of right and wrong was high and inflexible; and no judge ever invested human life with more sacred sanctions. What, however, he maintained in *Seibert’s case*, and what he was afterwards sustained by the supreme court in maintaining, was the doctrine, alike humane, philosophical, and Christian, that each man is to be tried according to his own lights. Hence it was that he admitted evidence, in order to determine the character of the homicide, self-defence being the issue, to show the general character and disposition of the deceased, as a quarrelsome, fighting, vindictive, and brutal man, of great physical strength, rejecting, however, evidence of “particular instances of his brutality in fighting,” &c. And hence, also, following this same principle, he charged the jury as follows: “When you ascertain from the evidence the manner of the admitted killing, if you find it to have been done in defence of an attack by the deceased, in deciding upon the character of the offence, you are called upon to examine and review everything which goes to explain the true situation of the parties at the time; their respective feelings and intentions,

<sup>1</sup> See *supra*, § 506.

shown by their acts, their threats, and menaces, as may be proven; and you may consider, too, their relative characters as individuals, including their strength and physical ability. You may inquire, too, whether the deceased, making, as is contended, the first assault, was bold, strong, and of a violent and vindictive character, and the defendant much weaker and of a timid disposition, and how far their power was equalized by the weapons in the hands of the latter. Legal rules are general, but in their application they must at times depend upon the special circumstances of particular cases. In the assault of a strong man upon a boy or female, of a powerful individual upon a weaker, the necessity of taking life in self-defence under an ordinary attack will be more easily discoverable, than in an attack by one man upon another under more equal circumstances. The probable ability to defend without the fatal resources must depend upon the means and power of defence in the assaulted. Moral power, too, is important in sustaining physical power. Timidity of disposition will never excuse rashness, and will not justify the creation or sustaining of imaginary fears, so as to excuse the taking of the life of another; but we say now, as we had occasion to say in this court some years since, in the trial of Joseph Davis, that the jury may, in deciding upon the degree or kind of homicide, the nature of the attack, and the necessity of the defence, consider this ingredient in the character of the slayer as an adjunct to his proper physical power, or rather weakness. You are to look at the parties in this unhappy transaction in their relative knowledge of each other's character and strength, and to consider the circumstances attendant upon the contest of Saturday, their respective feelings, and all the other circumstances as already called to your notice; to inquire whether the defendant, as the evidence shows him *to be*, the man that *he is* and *was* — not as one of greater courage and strength may be, but as *he was* when he did the act — had clear reason to believe that in case of an attack upon him by the deceased (the man that the evidence shows him to have been), he would be in danger of loss of life or of great bodily harm; and if you do so find, and further, that an attack, apparently of such intent and character, was made upon him, and in a room described as this has been, with no other means of escaping the contest, as contended by the defendant's counsel, under the evidence, but by taking the life of

the assailant; he would be excused in so doing, even though this, to him, reasonable belief of the horrible result of such a contest should be produced partially by the constitutional timidity of his own character, doubly excited by the comparative weakness of his own bodily ability, proved in the contest with the assailant of the day previous. Look you into the heart of the defendant at the time of the transaction; search out his motives, as his acts and declarations show them; and say whether he, constituted as nature made him, and with all his means of defence, had reason to believe, and did believe, that he was in the serious danger spoken of.”<sup>1</sup>

§ 508. So Judge Agnew, of the supreme court of Pennsylvania, in charging a jury in 1868,<sup>2</sup> says: “If there be nothing in the circumstances *indicating to the slayer at the time of his act that his assailant is about to take his life or do him great bodily harm*, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal or nearly equal strength in taking his assailant’s life with a deadly weapon. In such a case, it requires a great disparity of size and strength on part of the slayer, and a very violent assault on part of his assailant, to excuse it.”

§ 509. In Massachusetts, if we are to judge from cases in which evidence of the deceased’s ferocity and brutality is declared inadmissible,<sup>3</sup> the view here defended is rejected; yet we must not forget that in Selfridge’s case, which has always been held law in Massachusetts,<sup>4</sup> evidence was received of the defend-

<sup>1</sup> See *supra*, § 506.

<sup>2</sup> *Com. v. Drum*, 58 Penn. (8 P. F. Smith) 1.

<sup>3</sup> See *infra*, § 625.

<sup>4</sup> The leading points laid down by the court in Selfridge’s case are as follows:—

“*Firstly*. That a man who in the lawful pursuit of his business is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm; such as retreating as far as he can, or disa-

bling his adversary without killing him, if it be in his power.

“*Secondly*. When the attack upon him is so sudden, fierce, and violent as that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating.

“*Thirdly*. When from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

“Of these three propositions, the last is the only one that will be doubted

ant's debility and of his expectation of being attacked by "some bully;" and Judge Parker expressly told the jury that these

anywhere; and this will not be doubted by any who are conversant in the principles of the criminal law. Indeed if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case: A. in the peaceable pursuit of his affairs, sees B. rushing rapidly towards him, with an outstretched arm, and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before, or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked must, before he strike the assailant, stop and ascertain how the pistol was loaded, — a doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle."

In another part of the charge, it is said: "I doubt whether self-defence could in any case be set up where the killing happened in consequence of an assault only, unless the assault be made

with a weapon, which, if used at all, would probably produce death.

"When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defence.

"There is another point of more importance for you to settle, concerning which you must make up your minds from all circumstances proved in the case, namely, whether the defendant could probably have saved himself from death, or enormous bodily harm, by retreating to the wall, or by throwing himself into the arms of his friends, who would protect him. If you believe under all the circumstances, the defendant could have escaped his adversary's vengeance, at the time of the attack, without killing him, the defence set up has failed, and the defendant must be convicted. If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him as will deprive him of the privilege of setting up a defence of this nature.

"It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace were intended by the deceased, there are certain principles of honor and natural right, by which the killing may be justified. These are principles which you as jurors, and I as a judge, cannot recognize. The laws which we are sworn to administer are not founded upon them. Let those who choose such principles for their guidance, erect a court for the trial

were among the chief points for them to consider in determining whether the danger to the defendant was apparent.

of points and principles of honor ; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I, therefore, declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you, that no means of saving his life or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power, he has been guilty of manslaughter, notwithstanding you may believe that the case does not present the least evidence of malice or premeditated design to kill the deceased.

"If a man for the purpose of bringing another into a quarrel provokes him, so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger kill his adversary, he will be guilty of manslaughter, if not murder, because the necessity, being of his own creating, shall not operate in his excuse.

"You are therefore to inquire whether this assault upon the defendant by the deceased was or was not by the procurement of the defendant ; if it were, he cannot avail himself of the defence now set up by him."

On this charge the following criticisms may now (1875) be repeated : —

1. By the law stated in the third paragraph, a person suspecting that a larceny on the person is about to be committed by an assailant would be justified in killing the assailant to prevent it. And what is more, the position goes the broad length of saying that when there is "reasonable ground" for one man to suspect another of an intent "to destroy his life,"

or to "commit any felony upon his person," the former may take the latter's life, no matter how unfounded is the suspicion, or how abundant are the opportunities of arresting the apprehended felon by a less bloody process. It was in fact to this proposition, which was stated independently, that the attention of the jury was particularly called, from the very fact of the struggle of the judge to reconcile it with the current of authority. That it was the clause on which the jury hung their verdict, cannot now be asserted ; but that it has been quoted before and since to justify those cases in which personal violence has been used, either to arrest or to punish suspected crime, is a fact with which those acquainted with criminal trials cannot but be familiar.

2. As has been already observed, the evidence was that Selfridge had not only posted the father of young Austin, in language singularly insulting, but had sought to bring the quarrel to a settlement by arms. No fact in the case was less contested than this ; and under the circumstances the jury should have been told that an attack provoked by the defendant could not be set up by him in self-defence. It made no difference that the son, in the quarrel, represented the father. Selfridge, in his card, bestowed language on the father which he knew would be equally humiliating to the son. And the pistol carried by Selfridge was intended, as the evidence showed, not for the father only, but for the son, if he should be disposed to resent his father's wrongs.

3. One other feature in the charge, which it would be improper here to introduce without dissent, is that which assumes the fact that "great bodily

And the present tendency of the Massachusetts supreme court is to return, though with the reservation that the impression

harm was apparently intended by the deceased against the defendant." The assumption of such a matter of fact should never be made in such a way as to lead to the belief that it is a matter of law. How far the assumption was justified in the present case will be seen by the following summary of the evidence: The deceased, Charles Austin, was a student in Harvard University, about eighteen years of age, "tall, but not stout, and not called strong," and the son of a gentleman who had been for some time, as appeared in evidence, an active politician in the democratic ranks. The defendant was a member of the Suffolk bar, a man somewhat advanced in his profession, conspicuous himself as a federalist, and distinguished, it was said, no less for the urbanity of his manners than the excellence of his attainments. A quarrel had arisen between the defendant and the father of the deceased, on the subject of a political celebration of the Fourth of July; and so great was the party heat of the times, that it seemed advisable to the defendant and his friends, and appeared quite natural to the jury, that the dispute should be settled by stress of arms. Mr. Selfridge was informed, it was said, by a friend on the morning of the homicide, that he was to be attacked; and he stated to another, a few minutes before the meeting, that he understood Mr. Austin, the father of the deceased, had procured some one to bully him, though it is difficult to see why such a declaration, not part of the *res gesta*, but evidently set up for the purpose of contingent justification, should have been admitted. Much variance of testimony existed on the subject of the conflict. John M. Lane testified that he was standing

at the door of his shop, on the north side of State Street, between Wilson's Lane and Exchange Lane, and saw the defendant standing on the pavement when young Mr. Austin was approaching, and that the defendant, when the deceased was at arm's-length, took deliberate aim at him and fired; after which the deceased aimed several strokes at him, and fell. Edward Horn testified that, as he was passing by, he heard a loud talking, and looking round he saw Selfridge with a pistol in his hand, heard the pistol immediately fired, and then saw the deceased aim one or two convulsive blows at the defendant and fall. Ichabod Frost testified substantially to the same facts. On the part of the defendant it was shown that the deceased, Charles Austin, usually carried a rattan, but that morning had procured a larger stick; and a series of witnesses were produced to show a state of facts different from that proved by the commonwealth's evidence. John Bailey testified that Charles Austin had been standing in front of his shop that morning, in conversation with a fellow-student; that shortly after Selfridge approached; that Austin then, lifting his cane, with the heavy end in his hand, moved towards Selfridge, and that he raised the cane as if to strike, and while it was in the act of descending the pistol was fired. Zadoc French swore to the same effect. Richard Edwards saw Selfridge with the pistol extended; saw Austin aim a blow at him, and heard the pistol discharged, though not until the blow had fallen. Horatio Bars could not say who struck the first blow. Lewis Glover swore distinctly that Austin had struck at Selfridge before the pistol was fired.

must be reasonable, to the subjective tests established in Selfridge's case. Thus under the statutes authorizing the defendant

It was shown in addition, that the day before, Selfridge had posted the father of the deceased as "a coward, liar, and a scoundrel;" and that the latter said that "he considered it derogatory to enter into a newspaper controversy with one T. O. Selfridge," &c. It was shown also that the deceased had mentioned to a college friend, that so long as he remained connected with the college, he could not, consistently with that connection, take any notice of the publication of that morning; but after he left college, neither T. O. Selfridge nor any one else should asperse his father or any of his connections, with impunity. On the other hand, it was shown that the deceased was accustomed to carry a stick of the same size whenever he walked in from Cambridge; and that, while he had passed the morning in such a way as to make the idea of a preconcerted attack absurd, his father, when called to the stand, expressly swore that so far from having schemed, either for himself or his son, a collision with the defendant, the thing was farthest from his mind, and, to use his strong language, "I appeal to God, he would have passed me as safely as he stands at this bar."

Such were the facts upon which the above charge was given, and on which the jury thought proper to acquit the defendant of manslaughter to which the bill of indictment was limited, he having previously been admitted to two thousand dollars bail by the supreme judicial court. That the whole case — bill, bail, and verdict — exhibits a singularly loose estimate of the value of human life must be admitted. If the commonwealth's witnesses, by whom it was shown that the defendant had previously prepared a

pistol for the encounter, were to be believed, — and the commonwealth's witnesses alone could have been heard on an application to hold to bail, and before the grand jury, — the case would have been one, taking the previous posting into consideration, of murder. But it is strange to see, from the defendant's own case, how anything lower than manslaughter could be extracted. He had not retreated to the wall, for he had fired instantaneously, at the first encounter, and it cannot be said that a man of thirty, armed with a pistol, can be reduced to desperate danger by the onset of another of eighteen, with a cane in his hand, of which he was holding the heavy butt end, in a street in which there were a dozen spectators. The whole case showed an intention, on the part of Selfridge, to shoot down any one who should meet him; but it is difficult to collect, from the conduct of Charles Austin, that there was any settled purpose of revenge on his mind, or any other feeling than that which would naturally occupy the breast of a young man of eighteen, who had just seen his father posted as a scoundrel.

The defence, shadowed out, rather than expressly delineated, by Mr. Dexter, in a speech of consummate ability, was the same as that presented by Mr. Selfridge, in a statement subsequently published: "The honor of a gentleman should be as sacred as the virtue of a woman; but the female is authorized to take his life, who would violate her honor. Why is not a man bound to maintain his honor at the same hazard?"

That Selfridge's trial was made a political issue appears from a contemporaneous letter from Mr. Cunningham



to be examined in his own behalf, when the defendant has introduced evidence tending to show that, at the time he struck the blow, he had reasonable cause to apprehend an attack upon and serious bodily harm to himself from the man he killed, he is now allowed to testify that at that time he did in fact apprehend such an attack.<sup>1</sup>

§ 510. Judge Thurman, in a capital case in Ohio, in 1852,<sup>2</sup> says: "Whether a person assaulted is or is not bound to quit the combat, if he can safely do so, before taking life, it will not be denied that in order to justify the homicide, he must, at least, *have reasonably* apprehended the loss of his own life, or great bodily harm, to prevent which, and under a real, or at least *sup-*

to Mr. Adams (Cunning. Cor. 70), in which he says: "I happened to be at the first court at Worcester which was holden after the acquittal of Mr. Selfridge. There I was told by Mr. Speaker Begden and others that I was accused of having apostatized from Federalism. I informed them, that if the expression of my firm conviction that Selfridge had been guilty of murder, and ought to have been hanged, was the sole ground of the accusation, and that if that was enough to constitute a secession from Federalism, I wished to be considered as seceding. But I was not ejected. The great political parties in the state, arranged under their respective standards on the simple question of the guilt or innocence of an individual under a criminal accusation, was a curious spectacle." As to partisan character of court, see *Memoirs of J. Q. Adams*, IV. 422.

<sup>1</sup> *Com. v. Woodward*, 102 Mass. 159. "The argument of the counsel for the commonwealth," said Wells, J., "proceeds upon the supposition that this was an offer to prove the defendant's actual apprehension of a blow from the deceased as a distinct, separate, and independent proposition, instead of proving that he had reasonable grounds to apprehend such a blow.

But this is not the true aspect of the case. The proposition upon which this defence must rest, and which was in fact submitted to the jury, consisted of two branches: one the reasonable cause, the other the actual apprehension or thought of the defendant, and his purpose or intent. Both must exist or neither will avail. In determining whether the evidence of an actual apprehension of bodily harm is admissible, the court cannot be governed by its own conclusions from the testimony as to the sufficiency of the proof of reasonable cause; but if there is any testimony which, if believed, would warrant the jury in finding that there was such reasonable cause, though it comes from the defendant alone, and is in conflict with all the other evidence in the case, it is sufficient to entitle the defendant to testify, in support of the other branch of the proposition, that he did in fact act under such an apprehension. The court will, of course, as it did in the present case, instruct the jury that both branches of the proposition are essential to the justification. As there was some testimony to show reasonable cause, the evidence offered to show an actual apprehension should have been admitted." See *infra*. § 625.

<sup>2</sup> *Stewart v. State*, 1 Ohio St. 66.

posed necessity, the fatal blow must be given." But "reasonably" by what standard, and "supposed" by whom? That the defendant was the person thus taken as a standard appears from a succeeding passage in which Judge Thurman, when inquiring whether there was such a *bond fide* supposition by the defendant, says, "We find no evidence tending to prove that Stewart (the defendant), when he saw Dotey (the deceased), was in danger of loss of life or limb, or of great bodily harm, or that he apprehended such danger." It is clear, therefore, that "reasonably" is used by Judge Thurman in antithesis to "negligently." If the defendant "reasonably," i. e. in due exercise of his reason, believed himself in danger, this is a defence.

§ 511. *Michigan*.—In Michigan we occasionally notice the same ambiguities of expression which are met with in other states. But the test which is here defended was adopted in an ably argued opinion of the supreme court delivered in 1860.<sup>1</sup> "Were a man charged with crime," says Campbell, J., "to be held to a knowledge of all facts precisely as they are, there could be few cases in which the most innocent intention or honest zeal could justify or excuse homicide. The jury, by a careful sifting of witnesses on both sides, in cold blood, and aided by the comments of court and counsel, may arrive at a tolerably just conclusion on the circumstances of an assault. But the prisoner who is to justify himself can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect; and cannot well see the true meaning of all that occurs at the time; while he can know nothing whatever concerning what has occurred elsewhere, or concerning the designs of his assailants, any more than can be inferred from appearances. And the law, while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts, unless their ignorance arises from fault or negligence."

§ 512. In another case in Michigan, decided by the supreme court in 1872,<sup>2</sup> the evidence was that the prisoner and the deceased had an altercation about the alleged ill-treatment by the prisoner of a boy, at the supper table of the prisoner, and the deceased, who was a farmer, and for whom the prisoner had been working. The

<sup>1</sup> *Pond v. State*, 8 Mich. 814. See <sup>2</sup> *Hurd v People*, 25 Mich. 405. *infra*, § 631.

prisoner, it appeared, had been previously injured by an accident, and was nervously unstrung. The deceased was much the larger and apparently the stronger man. At the beginning of the altercation, the deceased seized the prisoner by the lapels of the coat and shook him several times, and threw him on the ground ; “and the prisoner thereupon went into his house and loaded his pistol, and a few minutes afterwards came out to where the deceased was at work and requested him to come into the house and ask the women folks whether he had abused the boy ; and the deceased threw down his work and ran after the prisoner in a threatening manner, but without any weapon in his hands, and pursued the prisoner into his house, although the prisoner at the threshold commanded him not to enter ; and continued the pursuit, until the prisoner had run into a room from which there was no egress, whereupon he turned and shot the deceased, then but four or five feet from him ; and the deceased still advancing, he shot him a second time ; of which wounds the deceased died.” It was ruled by the supreme court, that this was not murder in either degree, but was a case of excusable homicide or manslaughter ; *excusable homicide*, if the jury were satisfied that the defendant being in his own house, honestly believed from Hubbard’s actions and manner, and what had already taken place, that it was necessary to shoot the assailant to save his own life, or to protect himself from danger of great bodily harm ; *manslaughter*, if he did not so believe, but committed the act under a less degree of fear, and the excitement and confusion caused by the first assault, coupled with the then threatened repetition of the attack, and that but for these, he would not have fired the fatal shot. “The provocation,” said the supreme court, “may not have been sufficient, it is true, to excuse the act, or entirely take away its criminality ; that depends upon the question whether, as already stated, the acts of Hubbard and the circumstances *as they appeared to Hurd, under the excitement, haste, and confusion of the moment, rendered it necessary, in his opinion, for the protection of his life, or to avoid grievous or dangerous bodily harm.* The fact that he armed himself before going out the second time, when taken in connection with what preceded and what followed, cannot be considered as tending to show malice, however strong may be its tendency to establish a case of manslaughter. His conduct showed that he was anxious to have the matter of the diffi-

culty with the boy, which had so excited Hubbard, fully explained to him ; and, for that purpose, wished him to inquire of the women. His arming himself before he went to invite him to come and hear the explanation would seem to have been only to protect himself against the rashness which he had reason to apprehend from Hubbard ; and, upon the evidence, there is no room for doubt that had Hubbard come in quietly and listened to the explanation, the difficulty would have been amicably settled." And on the ground that the defendant honestly believed himself in danger, this belief being induced by the deceased's misconduct, the case was held, supposing there was no negligence on the defendant's part, one of self-defence.<sup>1</sup>

The question, it must be noticed, came up on the refusal of the court trying a homicide case to admit evidence of the high temper and quarrelsome disposition of the deceased. " This, we are satisfied," such is the opinion of the supreme court in reversing this ruling, " was a serious error, directly affecting the question of the defendant's guilt ; and if the defendant when threatened with immediate attack by an assailant is authorized to act, and his actions are to be judged from the circumstances as they appeared to him at the time, as held by this court in *Pond v. The People*, 8 Mich. 150, as admitted by the Court in his charge (a principle of natural justice — which must never be overlooked in such cases), then it necessarily follows that the evidence offered was admissible, since the knowledge or belief of the prisoner that the person threatening him with an immediate personal attack is a man of high temper and quarrelsome disposition, is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he has reason to expect from the assailant, as well as the means which, at the moment, he may deem necessary to guard himself from the threatened danger. This must, in the nature of the case, be so with any man placed in the situation the defendant occupied at the moment of the shooting." <sup>2</sup>

§ 513. *New York.* — In New York the opinion of Judge Bronson in *Shorter's case*, as already cited, has been frequently referred to, in succeeding trials, as properly expounding the law. At the same time, in *Lamb's case*, in 1866, the judge trying the

<sup>1</sup> See *infra*, § 621.

<sup>2</sup> *Hurd v. People*, 25 Mich. 840 ; *infra*, § 621.

case charged the jury as follows: "A man is not bound, if his life is in imminent peril or danger, to wait until he receives a fatal wound, or has some great bodily injury inflicted on him. *If he think his life is in imminent peril*, he has a right to act upon that thought and take life; but if he does it, it is at the risk of a jury saying, when all the facts are developed before them, *whether he was justified in forming that opinion or not*. If you are satisfied from the evidence that the circumstances did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and you have a right to convict. It is not his impressions alone, but the question is, whether those impressions at the time he formed them were correct. If they were correct, it is a protection; if they were incorrect, then it affords him no immunity or protection." This is certainly very loosely put; and we can only reconcile the last statement with the first three by supposing that "correct," in the last sense, is to be understood as "correct according to the defendant's own opportunities of judging." But however this may be, we learn, on examining the opinions of the appellate judges, that the charge was, in the opinion of Davies, C. J., Smith, J., and Morgan, J., not erroneous, when taken as a whole; and that Smith, J., and Morgan, J., were of opinion that there were no facts proved to which a charge on the law of self-defence was applicable, and hence that it was not, if erroneous, calculated to prejudice the defendant.<sup>1</sup>

§ 514. *Tennessee*. — In Tennessee the question was first mooted in Grainger's case, decided by the supreme court of that state in 1880.<sup>2</sup> The defendant had been convicted of the murder of a man named Broach, and a bill of exceptions taken to the supreme court. The facts, so far as the report tells us, showed that Grainger was riding home on horseback when he met Henson, who was on foot, whom he invited to mount and ride behind him, which Henson did. Broach, the deceased, afterwards overtook them, riding rapidly, and after calling Grainger a liar, "struck him a violent blow on the breast. Grainger turned his horse suddenly away, and rode a short distance apart from Broach, saying to Henson: 'Take notice, I will make him pay for it.' The quarrel and ill language continued for about five eighths of a mile further, when they came to the corner of

<sup>1</sup> *People v. Lamb*, 41 N. Y. 646; and <sup>2</sup> *Grainger v. State*, 3 Yerger, 459. see *Temple v. People*, 4 Lans. (N. Y.) See *infra*, § 618.

119; and *supra*, § 513.

Rainey's fence, about forty yards from the house. Grainger threw his leg over his horse's neck and lighted on the ground, turned his horse to the fence, when Henson also alighted. At this moment Broach also alighted from his horse; Grainger threw his bridle over a rail, crossed the fence and walked towards the house, saying to Henson: 'You are in cahoot with Broach.' Henson said he had nothing against Grainger, who replied: 'I don't know that you have.' The house stood some ten yards inside of the line of fence, and forty yards in advance of where the parties alighted. Grainger walked inside; Broach and Henson outside. Opposite the house there was a gap. Rainey, his wife, and two other women were awakened out of their sleep by the violent quarrelling. The first Rainey heard was the defendant crying, Rainey, Rainey, — like one afraid and calling for help. The women got up and looked through a crack of the cabin; Grainger was standing two or three yards from the wall, Broach advancing upon him, having passed through the gap. Grainger said to him: 'I will shoot you if you follow me.' Broach replied: 'I am not afraid of your shooting; damn you, you would not shoot a cat; shoot!' Defendant said: 'I have a mind to shoot you.' Broach said: 'Here I stand, shoot!' Defendant fired and killed Broach. Broach was eighteen or twenty feet from Grainger when the gun was fired."

The opinion of the supreme court was given by Catron, C. J., afterwards a judge of the supreme court of the United States: "The bill of exceptions shows that much stress, on the trial, was laid upon the blow given by Broach to Grainger, to reduce the killing to manslaughter; that Grainger's passions had not cooled. He never had any passion; he was much alarmed, and with good cause. A man was on his horse behind him; he could not get away. Henson proves he did not pretend to prevent Broach from whipping Grainger, who believed, and most probably, rightfully, that Henson was in 'cahoot' with Broach. It was Henson's duty to have protected Grainger, or got off from behind him, and left him free to escape from Broach.

"Grainger used all the means in his power to escape from an overbearing bully. He was shuddering with fear, and his last hope of protection was defeated when Rainey's door continued closed against him, and Rainey did not come to his relief. He shot only to protect his person from threatened violence, and

that great. It was certain. Henson sat quietly on the fence; the women and Rainey did not open the door; they were, no doubt, afraid of Broach, who displayed the traits of a reckless bully, and would have attacked Grainger the moment he reached him, as well in the house as out of it. It behooved Rainey not to permit the attack in a cabin amongst women and children, in the dark. He did right not to open the door. From Henson no assistance could be hoped; the women saw him quietly sitting on the fence, which, when Broach crossed, he helped himself over by putting his hand on the shoulder of Henson. These are the facts as presented by the record before us.

“Was there malice prepense in this case of homicide, so as to exclude the benefit of clergy, within the 23 Henry 8, ch. 1? Did Grainger display a cold, deliberate, and wicked conduct? A heart lost to all social order and fatally bent on mischief? It cannot be believed. He behaved like a timid, cowardly man, was much alarmed, in imminent danger of a violent and instant assault and battery, and was cut off from the chances of probable assistance. That the act was the result of fear, hardly admits of doubt. It is equally certain to our minds that Broach only designed to commit a trespass and battery upon the body of Grainger, without intending to kill him. *If the jury had believed that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self-defence. But if he thought Broach intended to commit a battery upon him, less violent, to prevent which he killed Broach, it was manslaughter.* 1 Hawk. P. C. ch. 28, § 23; 1 East C. L. 272. The judgment will be reversed, and the cause remanded for another trial.”

The conflict of opinion as to the authority of this case has been produced by the syllabus, the first point of which is: “If a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice kill another under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter nor murder, but self-defence.” It is not a matter of surprise that a statement so unqualified should have encountered, as has actually been the case, much judicial dissent,<sup>1</sup> nor

<sup>1</sup> See *Teal v. State*, 22 Ga. 75; *People*, 2 Comst. 193; *Gladden v. State v. Shippey*, 10 Minn. 223; and *State*, 12 Fla. 562. In the latter other cases cited in *Horr. & Thom. case* (1872), *Wescott, J.*, said:—*Cas. 243 et seq.*; and see *Shorter v.*

that the court to which it was attributed should have subsequently shrunk from its adoption as a permanent rule of practice.<sup>1</sup> For to make an apparent but unreal danger a good ground for taking the life of an assailant, the defendant must not only show that the danger was apparently imminent, but that he, in thinking it to be so, was guilty of no negligence. If, as has been already noticed, I, from failure to exercise due diligence, shoot a supposed assailant, when, if I had exercised such diligence, I would have seen that my fears were visionary, then I am guilty of manslaughter, though my belief as to the reality of the danger was sincere. Now whether I am "cowardly" or not makes no difference in this respect. A brave man may shoot another under the negligent belief of unreal danger, and in so doing be guilty of manslaughter; while a coward may shoot another under a non-negligent belief of unreal danger, and in so doing be chargeable only with excusable homicide. "Cowardice" has therefore nothing to do with the question, so far as its juridical relations are concerned; nor is it brought forward by Judge Catron, a judge of eminent good sense, as in any way qualifying the principle of law on which he rests the decision. "If the jury had believed," so he says, "that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self-defence." Of course, were this to be stated with legal completeness, negligence on the part of Grainger would be negatived. "If Grainger," so the opinion would then run, "believed, without any negligence on

"The second instruction asked and refused was: 'If you believe from the evidence that the prisoner killed the deceased through fear or cowardice, or under the belief that great bodily harm is about to be done, although there was no danger to his life or great bodily harm, it will be a justifiable killing, and you will acquit.' This instruction is based upon the doctrine enunciated in the case of *Grainger v. State*, 5 Yerger, 459, and is in effect that the act is justified if the prisoner killed the deceased under the belief that great bodily harm was about to be done, although there was no such danger.

tainly very different. In *Grainger v. State* the court say: 'Grainger used all the means in his power to escape from an overbearing bully. He shot only to protect himself from threatened violence, and that great. He behaved like a timid and cowardly man, was much alarmed, and was cut off from the chances of probable assistance.' Here, at the time of the killing, Gladden was on horseback several yards off with a gun in his hand, and his victim without any like weapon, in no position to strike or even to defend himself."

"The facts in these cases are cer-

<sup>1</sup> See *State v. Rippey*, 2 Head, 217; *State v. Williams*, 3 Heisk. 376.



his part, that he was attacked and in imminent danger from Broach, then the killing of Broach would have been in self-defence." But even the mere outline of the law, as given by Judge Catron, does not vary from the law as usually presented in the text-books. The commotion produced by Grainger's case, therefore, is due, not to the decision itself, for the evidence showed danger not only apparent but real; nor to the opinion of Judge Catron, for that does not go beyond the law expressed by many other eminent judges and text writers; but to the blunt and unguarded way in which the point is brought out by the reporter. "Cowards are at liberty to shoot any persons of whom they are afraid;" such seems a natural paraphrase of the first point of the syllabus. But this is not what the court ruled.<sup>1</sup>

§ 515. In a still later case in the same court we have the following: "These are, doubtless, extreme cases; but they are used to show that the '*overt act*' spoken of is a question depending upon the entire circumstances of each particular case, and also to illustrate the meaning of the expression that 'the danger must be imminent at the moment.' These expressions must be understood in their proper sense, and as applied to the facts of each case; and to show that the defendant's fear was honest and in good faith, it should appear that the circumstances were such as would naturally create this apprehension in his mind, not that he was in actual danger. One party might assail another with a gun or pistol in such a manner as to create an honest belief in the mind of the latter that his life was in instant peril, and yet it might, in reality, afterwards appear that

<sup>1</sup> See also the remarks of Ch. J. Nicholson, of Tennessee, in 1871. *Williams v. State*, 3 Heisk. 376. "That defendant had fears of the deceased, and had good reason to have fears, we think the proof fully establishes. But the important question now presents itself, did he really entertain the fear of death or great bodily harm at the time he ~~fixed~~ the gun and did the killing? and did he shoot under an honest and well founded belief that it was absolutely necessary for him to kill the deceased at that moment, to save himself from a like injury? To make

out his justification, all these things must concur. It is not enough that defendant honestly believed that his own life was in danger, or that he was in danger of great bodily harm from the deceased, at some future time; but he must have believed that the danger was real at the time; that it was apparent and imminent. There must have been words or overt acts at the time of the shooting clearly indicative of a present purpose on the part of the deceased, to take his life or do him great bodily harm." And see *supra*, § 514.

the gun or pistol was not loaded, and the attack was really feigned ; but if this was not known to the party assailed, and the circumstances were such as were reasonably calculated to deceive him, his defence would certainly be as complete as if the danger had been real ; and in this sense must be understood the remark, that there must be reasonable ground for the defendant's action.

“Now, it is very apparent that in all cases where previous acts of hostility and threats upon the part of the deceased, in connection with his character, and the facts immediately attending the homicide, may establish the fact that the defendant, in taking his life, acted under the belief that his own life was in peril, the testimony should be heard ; otherwise, the true attitude of the parties, and the grounds upon which the defendant acted, and his state of mind, would not appear.”<sup>1</sup>

§ 516. *Missouri*. — In Missouri the rule has been thus expressed : “When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant, if that be necessary to avoid the apprehended danger ; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done. *He must decide at his peril upon the force of the circumstances in which he is placed*, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false, which would be innocence had they proved true.”<sup>2</sup> . . . .

§ 517. In *Alabama*,<sup>3</sup> Ch. J. Dargan thus speaks : “But the latter part of the second charge informed the jury, that unless the prisoner had reasonable ground to believe that the necessity was pressing, then he was not justified. It is true, that the necessity which exculpates the accused from guilt need not be actual. If the circumstances be such as to induce a reasonable belief that such necessity exists, the law will acquit the slayer of all guilt ; but if there is no reasonable ground for believing that

<sup>1</sup> McFarland, J., Sup. Ct. of Tenn., *Jackson v. State* reported in Horrig. & Thom. Cas. p. 482.

<sup>2</sup> Wagner, J., *State v. Sloan*, 47 Mo. 604. See supra, § 516.

<sup>3</sup> *Oliver v. State*, 17 Ala. 587.

there is such a necessity, then the law cannot acquit him. Wharton's Crim. Law, 210; 1 East P. C. 272; State v. Scott, 4 Ired. 415. It has been said, that if a man kill another through fear, alarm, or cowardice, under the belief that great bodily harm is intended him, it is neither murder nor manslaughter, although at the time of the killing he was in no danger of injury. 5 Yerg. 459. We think it wholly immaterial to inquire, in laying down the principle of law, whether the party slaying was in a state of fear or alarm — whether he was a man of firmness of character, or of a weak or cowardly disposition. The question is, whether the circumstances were such as to produce a reasonable belief upon his mind of a pressing necessity to take the life of the assailant. If they were not, he cannot be justified by law. It may be said that the belief of imminent danger will exist in the minds of some, from circumstances that would produce no idea or belief of danger in the mind of another. This, however, will not alter the principle of law applicable to both. The law requires that the circumstances should be such as to create a reasonable belief of impending necessity. *The circumstances are to be ascertained by the jury, and they may consider the condition as well of the party killing as that of the party slain; and if they find the circumstances such as to create a reasonable belief in the mind of the accused that his danger was imminent, then the law would say that he might strike in his own defence. In no point of view has the prisoner been injured by this charge.*"<sup>1</sup>

§ 517 a. To the same effect may be cited the following from Smith, C. J., speaking for the appellate court of Mississippi, in 1859:<sup>2</sup> "To make a homicide justifiable on the ground of self-defence, the danger must either be actual, present, and urgent, or the homicide must be committed under such circumstances as will afford reasonable ground to the party charged to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished. Rev. Code, 601, § 84. Hence, the mere fear, apprehension, or belief, however sincerely entertained by one man, that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent, to render a homicide excusable or

<sup>1</sup> See also Carroll v. State, 23 Alab. 28; Noles v. State, 26 Alab. 81.

<sup>2</sup> Wesley v. State, 37 Missis. 327; aff. in Evans v. State, 44 Missis. 762.

justifiable within the meaning of the law, there must, at the least, be some attempt to execute the apprehended design ; or there must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent. *State v. Scott*, 4 Iredell, 409. A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable ; but if he act upon them and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been, of the reasonableness of the grounds upon which he acted. That is a question which the jury alone are to determine."

§ 518. In *Iowa*, in a case already cited,<sup>1</sup> Wright, J., takes precisely the distinction of the text, saying : "The inquiry is, was the danger actual *to the defendant's comprehension* ; not whether the danger existed in fact, but was it evident or actual *to the prisoner*, as compared with danger remote or probable."

In a subsequent case,<sup>2</sup> decided by the same court in 1871, we find Miller, J., saying : "A man may repel force by force, in the defence of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony on either. In such cases, he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger. Wharton's Am. Crim. Law, 8d ed. 436. And it has been held by this court, that a person is not required to flee from his adversary, when assailed with a deadly weapon, and retreat to the wall, before he can justify the killing of his assailant. *The State v. Tweedy*, 11 Iowa, 350. But to make a homicide justifiable, on the ground of self-defence, there must be an actual and urgent danger. *The State of Iowa v. Neeley*, 20 Iowa, 108 ; *The State v. Thompson*, 9 Ibid. 188. It is not necessary, however, that the danger should in fact exist, but that there be actual and real danger *to the defendant's comprehension*, as a reasonable man. The inquiry is not whether the harm apprehended was actually intended by the assailant, but was it actual and real *to the accused*, as a reasonable man, as compared with danger remote or contingent. *The State v. Neeley*, supra ; 1 Bishop's Criminal Law, 385 ; Wharton on

<sup>1</sup> *State v. Neeley*, 20 Iowa, 108 ;    <sup>2</sup> *Collins v. State*, 32 Iowa, 36. See infra, § 623.    *Murphy v. State*, 33 Iowa, 370.

Homicide, 407. Without expressing any opinion in respect to the *sufficiency* of the rejected evidence in this case, to justify the alleged assault, or even to mitigate its degree, we are of the opinion it should have been admitted to the jury, under proper instructions from the court upon the law, so that the jury, with all the facts and circumstances connected with the transaction before them, might be enabled to judge of the *intent* and motive of the defendant in the commission of the assault; whether to his comprehension, as a reasonable man, there was such an actual and urgent danger as to justify the alleged assault, or whether it was made wantonly and without actual apprehension of danger from McMillin." . . .

§ 519. *Analogy from cases of interference in the conflicts of others.*—So also may we interpret a class of cases already noticed,<sup>1</sup> where A. interferes to protect B., whom A. conceives to be unjustly and unfairly attacked by C. Now it does not matter whether A.'s impressions were right or wrong. If they were honest, and not negligently adopted, then A.'s offence is not higher than manslaughter.

So also in a case much quoted by the old writers. A quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier who had before driven a part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him he struck at them with the flat side, and as they fled pursued them. The other soldier in the mean time had got away, and when the prisoner returned he asked whether they had murdered his comrade; and being several times again assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed, the prisoner went up to him and struck him on the head with the sword, of which he presently died. This was holden manslaughter; it was not murder, because there was a previous provocation, and the blood was heated in the contest; nor was it in self-defence, because the killing in that manner was negligent.<sup>2</sup>

<sup>1</sup> Supra, § 446.

<sup>2</sup> Fost. 262; 1 Hawk. c. 31, § 44;

§ 520. *On principle the test is the defendant's honest belief. — Summary of the law.* — Viewing the law in this respect on principle, we are compelled to hold that the question of apparent necessity can only be determined from defendant's stand-point. Take the question, first, in its simpler relations. A. is assaulted

Leach, 151. The following early cases may be cited as bearing on the question before us: The prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed; his father ordered him to go to bed, which he refused to do; whereupon a scuffle happened between the father and son. The deceased, who was then in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him and beat him; the prisoner lying upon the ground with his brother upon him, not being able to avoid his blows or make any escape from his hands; and as they were striving together, the prisoner gave his brother the mortal wound with a penknife. At a conference of all the judges after Michaelmas term, 1704, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity, so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to have intended to chastise him for his misbehavior to his father; and to excuse homicide upon the ground of self-defence, there must always appear to have been such a degree of necessity as may reasonably be deemed inevitable. 1 East P. C. 277; *Pierston v. State*, 12 Ala. 149. At the conference in the above case, Powell, J., put the case: If A. strike B. without any weapon, and B. retreat to a wall and there stab A. that will be manslaughter; which Holt, Chief Justice, said was the same as the principal case; and that was not denied by

any of the judges. For it cannot be inferred from the bare act of striking that the intent was death; and without there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. *Ibid*.

Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon which Mr. Cope, returned a bottle with equal violence; Kel. 128, 129; and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another is not fit to be trusted with a dangerous weapon in his hand. Kel. 128, 129. There seems to have been good reason for Mr. Cope to have supposed that his life was in danger; and it was probably on the same ground that the judgment on Ford's case proceeded. Mr. Ford being in possession of a room at a tavern, several persons insisted on having it, and turning him out, which he refused to submit to; thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them; and this was adjudged justifiable homicide. Ford's case, Kel. 51. For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems (there being no compact to fight) that he would be justified in killing any one of the assailants in his own defence; because so unequal an attack resembles more a degree of assassination than of combat. 1 East P. C. c. 5, s. 47, p. 276.

by B. with what appears to be a loaded pistol in his hand. A. kills B., believing the pistol to be loaded, when it is not. This, it is agreed, may constitute a good case of self-defence. When we come to analyze A.'s belief, however, we find that it is an ordinary conclusion of inductive reasoning; a conclusion which is erroneous, because its minor premiss is false. Putting this process in syllogistic form, it stands as follows:—

Whoever assaults me with a loaded pistol endangers my life.

B. assaults me with a loaded pistol, &c.

Supposing, however, we substitute for the subject of the major premiss the term "Garroter,"—slightly varying the predicate, the process may be then thus stated:—

A garroter taking me by the throat is likely to do me great bodily harm.

B. is a garroter, taking me by the throat, &c.

Now, in the first case, it is enough if I honestly, though erroneously, believe that B.'s pistol is loaded; and in the second case it is enough if I honestly, though erroneously, believe that B. is a garroter. In both cases the error of the conclusion is one of the apprehensive powers. I err in my apprehension; I do not see aright; or I have been misinformed; or I have not heard aright. But in each case the error for which I am to be put on trial is *my* error, not somebody else's error. It is no excuse to me, if I resort to self-defence, that some "reasonable" looker-on believes the pistol to be loaded, when I know that it is unloaded. So it is no excuse to me, if I shoot down a person suddenly hustling me, that some "reasonable" looker-on believes the supposed assailant to be a garroter, when I know him not to be a garroter. So if I, according to my own lights, conclude the pistol to be loaded, or the assailant to be a garroter, then I am to be acquitted of malice if I act upon this belief, though I cannot be acquitted of manslaughter if I arrive at this belief negligently. In other words, I cannot be convicted of murder, which involves a malicious intent, unless I have such a malicious intent; though I may be convicted of manslaughter if I have killed another by aiming at him a dangerous weapon without due consideration. Nor does it make any difference that my conclusion as to the imminency of the danger is not that which a cool observer of ordinary capacity would have reached. In the first place we must remember that whoever puts me in a position of danger which so disturbs

or flutters me that I act precipitately and convulsively, is liable for the consequences of such precipitate and convulsive action. In the second place, even supposing my intellect is so disordered as to be incapable of logical action, it is by this disordered and illogical intellect, and not by the intellects of saner and more logical observers, that I am to be judged.<sup>1</sup> To this effect may be cited the observations of one of the most vigorous of contemporaneous English commentators. "Partial insanity," says Mr. Stephen, "may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding."<sup>2</sup> So Berner, an authoritative German jurist,<sup>3</sup> tells us, that "whether the defendant actually transcended the limits of self-defence can never be determined without reference to his individual character. An abstract and universal standard is here impracticable. The defendant should be held irresponsible (of malicious homicide), if he defended himself to the extent to which, according to his honest convictions as affected by his particular individuality, defence under the circumstances appeared to be necessary."

§ 521. As illustrations of this important principle the following cases may be here cited: To larceny a felonious intent is necessary; a person who takes another's goods honestly, though erroneously believing them to be his own, is not guilty of larceny.<sup>4</sup> A specific punishment is assigned to assaulting an officer: A., an officer, is assaulted by B., who is honestly and innocently ignorant that A. is an officer; B. is not liable for assaulting an officer, though chargeable with assaulting a private person.<sup>5</sup> A

<sup>1</sup> See this discussed in Whart. Cr. Law, 7th ed. § 57 a.

<sup>2</sup> Criminal Law of England, London, 1863, p. 92. The better conclusion would be, that as he (the defendant) used a dangerous weapon negligently, he would be liable as for negligent wounding.

<sup>3</sup> Lehrbuch d. Straf. 1871, p. 147.

<sup>4</sup> Whart. Cr. Law, 7th ed. § 1860. See *R. v. Reed*, 1 C. & M. 306; *Merry v. Green*, 7 M. & W. 623; *Com. v. Weld*, Thacher's C. C. 157.

<sup>5</sup> *Com. v. Logue*, 38 Penn. St. (2 Wright) 265; *Yates v. People*, 32 N. Y. 509. See *U. S. v. Ortega*, 4 Wash. C. C. 531; *U. S. v. Liddle*, 2 Wash. C. C. 205.



cruiser, under the innocent and honest belief that a merchant vessel is a pirate, captures the merchant vessel; this is not piracy in the cruiser.<sup>1</sup>

§ 522. So is it in cases of drunkenness. Drunkenness is itself negligence, and if a drunken man without prior malice kills another, it is manslaughter. But unless there be such prior malice, such killing is not murder, because the drunken man, supposing his mind to be stupefied by drink, is incapable of a specific intent to take life.<sup>2</sup>

§ 523. So also with regard to the peculiar psychological state called sleep-drunkenness, or *Schlaf-trunkenheit*. Children often wake up very slowly, and when waking are for a time only half conscious, liable to receive perverted impressions, and peculiarly susceptible to alarm. With some persons this tendency continues, in greater or less strength, through life; and several unquestionable cases are reported in which persons, in the excitement produced by misconceptions of danger when in this abnormal state, have greatly injured others.<sup>3</sup> Levett's case may not be improperly considered as involving in a lighter form this confusion of mind, incident to a sudden waking. Now suppose that a case should occur in one of our own courts similar to that elsewhere narrated, of a sentry,<sup>4</sup> who with his gun in his hand fell asleep at his post, but who, when suddenly awakened, fired at the person awaking him. No one would maintain that such a defendant was to be judged by the standard of the ideal reasonable man. And few would contend that in such case it would be irrelevant to prove that the defendant was subject to this very tendency to sleep-drunkenness, which is recognized as a distinct disease, temporarily stupefying the reason.

§ 524. In the same line may be noticed cases in which, under the influence of public excitement, the mind becomes so disturbed as to be incapable of a specific intent. During the Philadelphia riots of 1844 several cases of this character were brought before the courts. In such a whirlwind of terror and fanaticism as then swept over the Irish residents of Philadelphia, dividing them into

<sup>1</sup> *The Mariana Flora*, 11 Wheat. Com. 8 Bush, 463; *Jones v. Com.*, 11. See *Clow v. Wright*, Brayt. 118. infra, § 584; and other cases cited

<sup>2</sup> *State v. Garvey*, 11 Minn. 154; Whart. C. L. § 41.

*Keenan v. Com.* 8 Wright, 55; *Jones* <sup>3</sup> See 1 Whart. & St. Med. J. § 484.

*v. State*, 25 Ga. 595; *Shannahan v.* <sup>4</sup> Ibid.

two hostile camps, it was not strange that men of weak minds should lose their balance, and, maddened by fear, with their powers of discrimination paralyzed or frenzied, should use wildly and mischievously any dangerous instruments they might seize. Were such men to be held guilty, under the old common law rule, of murder, if it appeared that by them, or by those with whom they acted, others were killed? Neither Judge King, who tried the cases on their first presentation, nor Judge Rogers, of the supreme court, to which body one of the cases was subsequently removed, so thought. These clear headed judges held that the defendant could not be convicted of murder in the first degree, unless a specific intent to kill could be proved; and that this intent could not be supposed to have been harbored by men who were so overcome by excitement as to be incapable of knowing what they were about. Hence the convictions were for murder in the second degree or manslaughter.<sup>1</sup>

§ 525. So with regard to threats. Whether threats, uttered before a fatal collision, not communicated to the defendant, are admissible, is discussed in another section. It is clear, however, that the very courts which hold the defendants, on the question of intent, to the strictest accountability, have been the most reluctant to admit evidence of the deceased having threatened the defendant, unless it could be proved that those threats were known to the defendant. But why should proof of threats when known to the defendant be received? Simply because when known to the defendant they go to explain his motive when the question of self-defence comes up. They are therefore admitted; and when admitted are deemed of peculiar weight, because they tend to show that danger was imminent *to the defendant's apprehension*.

§ 526. So with regard to the character of the deceased. As will hereafter appear, the better opinion is that it is competent for the defendant, in cases of self-defence, to show that the deceased was a person of great physical strength, and of brutal and lawless character. No doubt this is admissible on general grounds, for the purpose of showing the deceased's attitude. But it is eminently proper for the purpose of proving that the defendant, according to his lights, had reason to believe that the attack on him endangered his life.<sup>2</sup>

<sup>1</sup> See Whart. Cr. Law, 7th ed. § 41.

<sup>2</sup> See *infra*, § 606.

§ 527. *But although the defendant believes he is in danger of life, and so believing kills his assailant, he is guilty of manslaughter if this belief is imputable to his negligence.* — A man who deals with deadly weapons is bound to act considerately; and if he kill another person, from his negligent use of such weapons, such killing, as is elsewhere fully shown, is manslaughter.<sup>1</sup>

§ 528. That this view underlies the Anglo-American law on this point a scrutiny of the preceding cases will demonstrate. In Levett's case, for instance, which is the crucial case in this branch of the law, we find a man who, suddenly aroused from sleep, under information wholly false, kills another whom he supposes to be a burglar, acquitted on the ground that in the circumstances he acted under an innocent error of fact. But Foster<sup>2</sup> tells us that "possibly it (the case in question) might have better been ruled manslaughter at common law, *due circum-spection not having been used.*" Judge Bronson, in commenting on this passage,<sup>3</sup> says, "He" (Foster) "calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder." In other words, when a man kills another in an honest error of fact, murder is out of the question. The only issue is, was this error negligent or non-negligent? If negligent, the killing is manslaughter. If non-negligent, excusable homicide.

§ 529. The same distinction is taken by Judge Bronson in the opinion last cited; and this distinction underlies the whole of Judge Bronson's argument, — an argument which, as has been seen, has been subsequently adopted by several American courts. With peculiar clearness is this brought out by Judge Campbell, of Michigan, in his admirable opinion in Pond's case.<sup>4</sup> "The law," so he correctly states, "while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts, *unless their ignorance arises from fault or negligence.*"<sup>5</sup>

§ 530. *Apparent attack, to be an excuse, must have actually begun.* — "The belief that a person designs to kill me," says Rufin, C. J.,<sup>6</sup> "will not prevent my killing him from being murder,

<sup>1</sup> See supra, § 87.

<sup>2</sup> Crown Law, p. 299.

<sup>3</sup> Shorter's case, supra.

<sup>4</sup> See supra, § 511-12.

<sup>5</sup> See also other cases cited supra, § 87-124.

<sup>6</sup> State v. Scott, 4 Ired. Law, 409.

unless he is making some attempt to execute his design, or at least is in apparent situation so to do, and thereby induces me to think that he intends to do it immediately."<sup>1</sup> The situation spoken of," however, as is well observed by Chilton, C. J., when citing the above passage,<sup>2</sup> "is not that he (the deceased) has the means at hand of effecting a deadly purpose, but that by some act or demonstration he indicates, at the time of the killing, a present intention to carry out such purpose, thereby inducing a reasonable belief, on the part of the slayer, that it is necessary to deprive him of life in order to save his own." It is true that a person who insanely believes himself to be attacked, and strikes down the supposed assailant, is not responsible for murder. But if a man is sane, he is not justified in repelling by force an attack which is not at least apparently imminent. And this is for two reasons. In the first place, if the attack is not apparently imminent, his duty is, as has been seen, to appeal to the law to arrest the supposed offender and to hold him to keep the peace.<sup>3</sup> In the second place, a person who undertakes to use a dangerous weapon to repel an attack which is not at least apparently imminent cannot relieve himself of the imputation of negligence. For he has used a dangerous weapon without due circumspection, and thus makes himself responsible for the consequences. As one negligently killing another, he is guilty of manslaughter.

§ 531. *Yet this is to be tested by defendant's capacity.*—In an Iowa case,<sup>4</sup> the court trying the case charged the jury that "to sustain the plea of self-defence, the defendant must show that Patrick Casady assaulted him, and that the danger was imminently perilous, and the danger to the defendant *actual* and *urgent*." This language was excepted to in error, but was sustained by Wright, J., in giving the opinion of the supreme court. "The very language employed," said that learned judge, "is

<sup>1</sup> *People v. Shorter*, 2 Comst. 193; *Horne*, 9 Kans. 119; *State v. Hayes*, 28 Mo. 287; *Creek v. State*, 24 Ind. 420; *People v. Lamb*, 54 Barb. 342; 151; *State v. Williams*, 3 Heisk. 376; *Patterson v. People*, 46 Barb. 625; *People v. Campbell*, 30 Cal. 212; *R. v. Pond v. People*, 8 Mich. 150; *Com v. Thurston*, 1 Den. C. C. 387; *Munden v. State*, 37 Tex. 353.  
<sup>2</sup> *Harrison v. State*, 24 Ala. 67.  
<sup>3</sup> See *supra*, § 488; *infra*, § 636.  
<sup>4</sup> *State v. Neeley*, 20 Iowa, 108; *Hor. & Th. Cas. on Self-defence*, v. *Morgan*, 3 Ired. 186; *State v.* 96.

sustained by the text of Wharton's Criminal Law, § 1020, and the authorities there cited; and when properly understood, there can be no doubt of its correctness. The inquiry is, *was the danger actual to the defendant's comprehension*; not whether the danger existed in fact, not whether injury was actually intended by the deceased, but was it evident or actual to the prisoner, as compared with danger remote or problematical?" In a recent thoughtful discussion of this topic,<sup>1</sup> the language of Judge Wright, as just quoted, is criticised as likely to mislead a jury; and the writers go on to say that they "are not able to see how these two propositions of Mr. Wharton—that of § 1020, that the danger must be actual, and that of § 1026, that it will be sufficient if the *apprehension* of immediate and actual danger be *sincere*—can be reconciled with each other, or how either of them can be reconciled with the correct law on the subject, as laid down in Selfridge's case, Shorter's case, Logue's case, Maher's case, Campbell's case, Pond's case, and many others." With regard to the last point (that of the incorrectness of both the positions just noticed), an argument has been already presented, and the reasons for maintaining that the *defendant's* apprehension is to be that by which the actuality of the danger is to be measured, have been given in detail. So far, however, as concerns the inconsistency of the two positions, that of "actuality," and that of the relativity of such actuality, a few words may not be here inappropriate. No doubt the bare assertion that danger must be "actual" is indefinite, and the standard by which such actuality is to be determined should be at the time stated; but it must be remembered that the term "actual" always involves relativity, unless, indeed, we accept the realistic philosophy, now so long exploded. A danger is "actual" not because it really *exists*, for we have no senses absolutely to determine the objective existence of phenomena, but because it is really *believed to exist*. But believed by whom? By the cool spectator, who is so placed that he can see that the instrument aimed by the assailant is but a stick of wood, painted so as to resemble a gun; or by the assailant's servant, who knows that though a gun, it is not loaded? Certainly not. By the jury, from their subsequent stand-point? This alternative has been already dismissed. It is enough now to say that either we must banish the terms "actual" and "real"

<sup>1</sup> Horr. & Th. Cas. on Self-defence, 105

entirely from juridical use, or we must employ them in their relative sense, — i. e. “ actual ” or “ real ” because appearing to be such to a particular observer ; and in issues such as the present, to the person accused.

§ 532. *Right may be exercised by servants and friends.* — The right of self-defence in cases of this kind is founded on the law of nature, and is not, nor can be, superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force, and even his servant attendant on him, or any other person present,<sup>1</sup> may interpose for preventing mischief ; and if death ensue, the party so interposing will be justified.<sup>2</sup> If A., B., and C. are in company together, and walking in the field, and C. assaults B., who flies ; and C. pursues him, and is in danger to kill him, unless there be help ; and A. thereupon kills C., in defence of the life of B. ; it seems that in this case there is such an inevitable danger of the life of B., that the killing of C. by A. is in the nature of *se defendendo*. But then it must appear plainly by the circumstances of the case, — as the manner of the assault, the weapon with which C. made the assault, — that the imminent danger of the life of B. is *bond fide* apparent to A.<sup>3</sup>

Where, in an affray, A. knocked down B., and C., a bystander, believing the life of B. to be in danger, B. having retreated as far as he could with safety, gave B. a knife to defend himself, to prevent further mischief, it was held that C. was justified in giving B. the knife.<sup>4</sup>

The right thus to assist applies with peculiar force to the relations of parent and child, of husband and wife,<sup>5</sup> and of guest to host.<sup>6</sup>

A person interposing, particularly if he be a stranger, should

<sup>1</sup> See *Irby v. State*, 32 Ga. 496.

<sup>2</sup> 1 East P. C. 271 ; *Com. v. Daley*, 4 Penn. L. J. 153. As to such interference in hot blood, see *supra*, § 446, 519 ; *infra*, § 549.

<sup>3</sup> 1 Hale P. C. 484. See *supra*, § 444 ; *infra*, § 549.

<sup>4</sup> *Com. v. Riley*, Thach. C. C. 471.

<sup>5</sup> *Cheek v. State*, 35 Ind. 492 ; *Pond v. People*, 8 Mich. 150 ; *Sharp*

*v. State*, 19 Ohio, St. 387 ; *Connaughty v. State*, 1 Wisc. 165 ; *Staten v. State*, 30 Missis. 619 ; *Handock v. Baker*, 2 B. & P. 260. See *supra*, § 412, 446. See *R. v. Harrington*, 10 Cox C. C. 370.

<sup>6</sup> *Cooper's case*, Cro. Car. 544 ; *Semayne's case*, 5 Co. 92 ; *Curtis v. Hubbard*, 1 Hill N. Y. 336 ; *S. C.* 4 Hill N. Y. 437 ; *De Forest v. State*, 21 Ind. 23 ; *infra*, § 549.

act with much caution. If, indeed, in cases of affrays, he interfere with a view to preserve the peace, and not to take part with either combatant, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable;<sup>1</sup> but, in general, if there be an affray and an actual fighting and striving between persons, and another run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter.<sup>2</sup>

## II. PREVENTION OF FELONY.

§ 533. *Bona fide belief by the defendant that a felony is in the process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable homicide, though if such belief be negligently adopted by the defendant, then the killing is manslaughter.*—Levett's case, which has been already discussed, rests on this principle. Levett, under the erroneous but honest belief that A. was attempting a burglary, killed A. It was adjudged excusable homicide in Levett, though if it had appeared that Levett had been negligent in arriving at this conclusion, it would have been manslaughter.<sup>3</sup> No doubt we frequently meet with expressions to the effect that to excuse homicide in such cases it must be shown that an offence was in fact about to be committed.<sup>4</sup> But such expressions are not to be strained to mean more than that a felony is *apparently* about to be committed. In what case can more be shown? Even supposing we see a known pickpocket seizing a purse, is it not possible that in such case, even at the last moment, the thief may hesitate? Can we, as to a future event, reach to anything more than a high probability? If so, we may correctly accept, in this as well as in the analogous case of self-defence, the position that if A., honestly and without negligence on his part, believes that B. is in the process of committing a felony which can only be arrested by B.'s death, A. is excused in killing B.<sup>5</sup>

<sup>1</sup> 1 Hale, 484.

<sup>2</sup> 1 East P. C. c. 5, s. 58, p. 290; Johnson's case, 5 East, 660.

<sup>3</sup> See supra, § 523.

<sup>4</sup> East Cr. L. 300; Burns v. Erben, 40 N. Y. 463; Brooks v. Com. 61

Pa. St. 352; Hawley v. Butler, 54

Barb. 490; Staten v. State, 30 Missis. 619; State v. Roane, 2 Dever. 58;

Adams v. Moore, 2 Selw. N. P. 934.

<sup>5</sup> See Ruloff v. People, 45 N. Y. 213; People v. Payne, 8 Cal. 341;

§ 584. *Danger must be apparent.* — So also the purpose to commit a felony, by the assailant, must be apparently clear; it not being enough if the evidence shows a mere assault.<sup>1</sup>

§ 585. *Necessity must be unprovoked.* — So also if A., interfering to prevent an apparently imminent felonious attack on B. by C., was a party to provoking the attack by C., the plea of necessity cannot be set up by A. when charged with killing C.<sup>2</sup>

§ 586. *Right cannot be exercised when there is an opportunity to secure the offender's arrest.* — We must repeat, however, that this principle cannot be extended so as to include cases where there is an opportunity to secure the punishment of the offender by due course of law.<sup>3</sup> It is on this ground that we must refuse assent to a Georgia case in which it was ruled excusable in A. to shoot in the morning B., who on the previous night had attempted to have carnal intercourse with A.'s wife.<sup>4</sup> No doubt had B.'s conduct in the morning amounted to a renewal of the attempt, showing that force was intended, then A. would have been excused. But as the evidence showed that B.'s offence in the morning consisted simply in taking his seat at the same breakfast table, at a public house, with the wife, there was no such evidence of the imminency of the danger as justified A. in having recourse to arms.<sup>5</sup> It is otherwise, however, when A. discovers B. entering the bedchamber of A.'s wife with the apparent intention of ravishing the latter.<sup>6</sup>

§ 587. *If felonious attempt is abandoned and the offender escapes, the killing of the offender without warrant, on a pursuit organized after such escape, is murder.* — In such case the sup-

Payne v. Com. 1 Metc. (Ky.) 370; McPherson v. State, 22 Ga. 478.

<sup>1</sup> See Parker v. State, 31 Tex. 182; State v. Morgan, 3 Ired. 193; R. v. Bourne, 5 C. & P. 120.

<sup>2</sup> Mitchell v. State, 22 Ga. 85; supra, § 482.

<sup>3</sup> Supra, § 413, 488, 530.

<sup>4</sup> Biggs v. State, 29 Ga. 723. The Roman law is clear to this point: L. 5. pr. D. ad L. Aquil. (9. 2.) . . . sin autem, quum posset apprehendere (furem), maluit occidere, magis est, ut iniuria fecisse videatur, ergo et Cornelia tenebitur. cap. 18. de homi-

cid. (5. 12.) . . . quamvis vim vi repellere omnes leges et omnia iura permittant: quia tamen id debet fieri cum moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad iniuriam propulsandum, non videtur idem sacerdos a poena homicidii penitus excusari . . .

<sup>5</sup> State v. Samuel, 3 Jones (Law), 74; State v. Neville, 6 Jones (Law), 432. See Parker v. State, 31 Texas, 182.

<sup>6</sup> Staten v. State, 30 Missis. 619; and see State v. Craton, 6 Ired. 164; infra, § 539.



posed offender is guilty only of an attempt at felony,—an attempt qualified and reduced by the fact of abandonment more or less voluntary.<sup>1</sup> The right of pursuit, heretofore touched upon, does not therefore apply to such case; and even if it did, it will not avail to defend a pursuer who has the opportunity of recourse to the law.<sup>2</sup> “A well grounded belief,” says Henderson, J., in a North Carolina case,<sup>3</sup> “that a known felony was about to be committed, will extenuate a homicide committed in prevention of the supposed crime—and this upon a principle of necessity; <sup>4</sup> but when that necessity ceases, and the supposed felon flies, and thereby abandons his supposed design, a killing in pursuit, however well grounded the belief may be that he had intended to commit a felony, will not extenuate the offence of the prisoner.” So in a subsequent case <sup>5</sup> it was justly said by the same learned judge, that “the law authorizes the killing of one who is in the act of committing a forcible felony, and even one who *appears* to be in the act of doing so, for the purpose of *prevention*, not by way of punishment.” This is of course consistent with the position that a person detected in an attempt to commit a felony may be arrested at once, for the purpose of being carried before a magistrate; and if arrested in the night-time may be lawfully detained without warrant until access to a magistrate may be had.<sup>6</sup>

§ 538. *Nor is killing excusable if the crime resisted could be prevented by less violent action.*—Thus, if a party attempting a felony is not armed (either actually or apparently) with a deadly weapon, or does not possess (either actually or apparently) such superior strength and determination as to enable him to effect his purpose unless he be killed, then killing him by a deadly weapon is not excusable.<sup>7</sup>

<sup>1</sup> See *Com. v. Holmes*, cited at large, *supra*, § 480.

<sup>2</sup> See *supra*, § 218, 259.

<sup>3</sup> *State v. Rutherford*, 1 Hawks, 457.

<sup>4</sup> See to this point *Ruloff v. People*, 45 N. Y. 213.

<sup>5</sup> *State v. Roane*, 2 Dev. 58.

<sup>6</sup> *R. v. Hunt*, 1 Moody C. C. 96. See *supra*, § 413, 488, 534.

<sup>7</sup> *R. v. Scully*, 1 C. & P. 319; *State v. Roane*, 2 Dev. 58; *State v. Rutherford*, 1 Hawks, 457; *R. v. Howarth*, 1 M. C. C. 207; *R. v. Williams*, 1 M. C. C. 387; *R. v. Longdon*, R. & R. 228. In *R. v. Bull*, 9 C. & P. 22, the evidence was, that the deceased was one of a party of six men who had been drinking together at several public houses, and were proceeding home along a road between twelve and one o'clock, on the night of the 18th of January, when they met the prisoner, who stabbed the deceased

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§ 539. *What offences may be thus prevented by killing the offender.* — It has already been seen that a person when assailed is excused if, under the honest and non-negligent belief that an assailant is about to kill him or inflict on him some grievous bodily hurt, he kill such assailant as the only way of preventing the immediate commission of the offence.<sup>1</sup> It has been seen also, that this same excuse applies to the prevention of any other forcible and atrocious crime. It certainly applies to attempts to commit a felony on a third person;<sup>2</sup> and although generally the right is limited to the prevention of felonies, yet as riots are productive of felonies, and as it is the duty of a private citizen to interfere for the suppression of riots, so if a riot can only be apparently suppressed by the taking of life, taking of life, even by a private citizen, will under such circumstances be excusable.<sup>3</sup> It would seem, however, that the right does not authorize the killing of persons attempting secret felonies, not accompanied with force.<sup>4</sup>

with a knife in the arm-pit. There was some discrepancy between the testimony of the witnesses, as to the conduct of the deceased and his friends, previous to the infliction of the wound by the prisoner.

C. Phillips addressed the jury on the part of the prisoner, and contended that he was entitled to an acquittal, on the ground that what he did was in self-defence, and amounted in law to justifiable homicide.

Vaughan, J. (Williams, J., being present), in his summing up, among other things, said, that it was not justifiable homicide, unless there was an intention on the part of the deceased and his companions, to rob or murder the prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another, merely because he feared he might be assaulted, or, indeed, if he were actually assaulted. His lordship told the jury that the question for their consideration was, whether the conduct of the prisoner made it necessary for the

prisoner to inflict that blow which almost immediately terminated in the death of the deceased; whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury. Verdict guilty.

<sup>1</sup> See *supra*, § 480.

<sup>2</sup> *Supra*, § 533; *Dill v. State*, 25 Ala. 15. Thus the entrance by A. into the bed-room of B.'s wife with the apparent intention of ravishing the latter, is an attempt at felony excusing B. in killing A. *Staten v. State*, 30 Missis. 619. See *supra*, § 412, 532. In respect to rape, the Roman law as well as our own is clear to this point. "D. Hadrianus rescriptit, eam, qui stuprum sibi per vim inferentem occidit, dimittendam." L. L. § 4, ad leg. Corn. de sic.

<sup>3</sup> *Res. v. Montgomery*, 1 Yeates, 421; *Wh. Crim. Law*, § 2934; *supra*, § 213, 255, 539; *Phillips v. Trull*, 11 Johns. 486; *Pond v. People*, 8 Mich. 150.

<sup>4</sup> See *R. v. Murphy*, 2 C. & P. 20; *State v. Vance*, 17 Iowa, 144; *Priester*

§ 540. *Trespass no excuse for killing trespasser.* We have already seen<sup>1</sup> how far trespass is a palliation. We may here repeat that it is murder for A. to deliberately kill B. for merely trespassing on A.'s property.<sup>2</sup>

*v. Augley*, 5 Rich. (Law) 44; *Fost.* 274; 1 Hale P. C. 488.

"It is held to be the duty of every one who sees a felony attempted by violence to prevent it if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance effectual. Where a felonious act is not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and, therefore, no justification for homicide, unless, possibly, in some exceptional cases. The rule extends only to cases of felony; and in these it is lawful to resist force by force. If any forcible attempt is made with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule, where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases.

"It has also been laid down by the authorities, that private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself. This is owing to the nature of the offence, which requires the combination of three or more persons assembling together, and actually accomplishing some object calculated to terrify others. Private persons who cannot otherwise suppress them, or defend themselves from them, may justify

homicide in killing them, as it is their right and duty to aid in preserving the peace. And, perhaps, no case can arise where a felonious attempt by a single individual will be as likely to inspire terror as the turbulent acts of rioters. And a very limited knowledge of human nature is sufficient to inform us, that when men combine to do an injury to the person or property of others, of such a nature as to involve excitement and provoke resistance, they are not likely to stop at half-way measures, or to scan closely the dividing line between felonies and misdemeanors. But when the act they meditate is in itself felonious, and of a violent character, it is manifest that strong measures will generally be required for their effectual suppression; and a man who defends himself, his family, or his property, under such circumstances, is justified in making as complete a defence as is necessary." *Campbell, J., Pond v. People*, 8 Mich. 150.

<sup>1</sup> *Supra*, § 414.

<sup>2</sup> *State v. McDonald*, 4 Jones Law (N. C.), 19; *State v. Brandon*, 8 Jones (N. C.), 463; *State v. Vance*, 17 Iowa, 188; *People v. Horton*, 4 Mich. 67; *People v. Cole*, 4 Parker, C. R. 35; *State v. Kennedy*, 20 Iowa, 569; *State v. Shippey*, 10 Minn. 223; *State v. Lambeth*, 23 Miss. 322; *R. v. Archer*, 1 F. & F. 351; *State v. Morgan*, 3 Ired. 186; *Com. v. Drew*, 4 Mass. 391; *Monroe v. State*, 5 Georgia, 95; *Oliver v. State*, 17 Ala. 588; *Carroll v. State*, 23 Ala. 28; *Noles v. State*, 26 Ala. 31; *Harrison v. State*, 24 Ala. 67; *Keener v. State*, 18 Georgia, 194.

Even when the trespass is the irregular assertion of a claim to property, the result is the same. Where A., having a right to the possession of a gun which was in the hands of the deceased, and which he knew to be loaded, attempted to take it away by force, and in the struggle which ensued the gun went off accidentally and caused the death of the deceased; it was held, that as the death was caused by the discharge of the gun, which was the result of the unlawful act of A., he was guilty of manslaughter; while if the shooting had been intentional, the offence would have been murder.<sup>1</sup> The principle is that if such killing take place in the passion and heat of blood, the killing is manslaughter, but under no circumstances can it be less. For the rule of law is, that where such trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do so, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the provocation; but if the injury be inflicted with an instrument and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter, the law so far recognizing the adequacy of the provocation arising from the trespass.<sup>2</sup>

*Owner of personal property resisting its illegal removal.* — The owner of personal property has a right to use as much force as is necessary to prevent its forcible illegal removal.<sup>3</sup> But to kill a mere trespasser, not attempting removing the property or any felony, is at least manslaughter; and if the killing be not in hot blood, is murder.<sup>4</sup>

<sup>1</sup> R. v. Archer, 1 F. & F. 351.

<sup>2</sup> Supra, § 414, and see Claxton v. State, 2 Humph. 181.

Whether the taking away and detaining of a man's children is a felony under the Alabama statute, or a trespass merely, depends upon the intent with which they are taken; and the question of intent is a question of fact for the jury. Hence, it was erroneous to charge the jury that the taking of the defendant's children, under the circumstances, would not have amounted to a felony. *Oliver v. State*, 17 Ala. 587.

<sup>3</sup> See *People v. Payne*, 8 Cal. 341; *Com. v. Kennard*, 8 Pick. 183; *Com. v. Power*, 7 Metc. (Mass.) 596; *Johnson v. Patterson*, 14 Com. 1; *People v. Hubbard*, 24 Wend. 369; *Curtis v. Hubbard*, 1 Hill, 336; *S. C. 4 Hill*, 434.

<sup>4</sup> *U. S. v. Williams*, 2 Cranch C. C. 439; *Com. v. Drew*, 4 Mass. 391; *Priester v. Augley*, 5 Rich. (Law) 44; *State v. McDonald*, 4 Jones (Law) 467; *State v. Morgan*, 3 Ired. 186; *State v. Vance*, 17 Iowa, 144.

## III. PROTECTION OF DWELLING-HOUSE.

§ 541. *When a person is attacked in his own house he need retreat no further.* — In such case the person attacked is not required to retreat further. Here he stands at bay, and may turn on and kill his assailant if this be apparently necessary to save his own life, nor is he bound to escape from his house, in order to avoid his assailant. In this sense, and in this sense alone, are we to understand the maxim that “Every man’s house is his castle.” An assailed person, so we may paraphrase the maxim, is not bound to retreat out of his house, to avoid violence, even though a retreat may be safely made.<sup>1</sup> But he is not entitled, either in the one case or the other, to kill his assailant unless he honestly and non-negligently believes that he is in danger of his life from the assault.

§ 542. *When a felonious attack on the house or its inmates is threatened, attack may be resisted by taking life.* — This may be when burglars threaten an entrance,<sup>2</sup> or when there is apparent ground to believe that a felonious assault is to be made on any of the inmates of the house. In the first case there can be no question that a person who, according to his lights, *bonâ fide* believes that a burglar is breaking into the house can take the life of such burglar, if this be apparently the only way of preventing the offence; and the *bonâ fide* belief is a defence, if not negligently adopted, even though an innocent person be killed. And the same rule applies to a felonious attack on any of the inmates of the house.<sup>3</sup>

§ 543. *But right only of defence and prevention.* — But this right is only one of *prevention*. It cannot be extended so as to excuse the killing of persons not actually breaking into a house.<sup>4</sup> Nor is killing justifiable for the prevention of a trespass or non-felonious entrance.<sup>5</sup>

§ 544. In the leading case on this point<sup>6</sup> the evidence was that M., who was indicted for murder, had made himself obnoxious

<sup>1</sup> 1 Hale P. C. 486; 3 Greenl. Ev. § 117; Pond v. People, 8 Mich. 814; Carroll v. State, 23 Ala. 28; Haynes v. State, 17 Ga. 483; Com. v. Smith, as discussed in Jones v. Com., quoted *infra*, § 584.

<sup>2</sup> See *supra*, § 533.

<sup>3</sup> See *supra*, § 505–534.

<sup>4</sup> Patten v. People, 18 Mich. 314; R. v. Meade, 1 Lew. 184.

<sup>5</sup> People v. Walsh, 43 Cal. 447; Carrol v. State, 24 Ala. 36; R. v. Bull, 9 C. & P. 22.

<sup>6</sup> R. v. Meade, 1 Lew. 184.

to some boatmen, by giving information of certain smuggling transactions, in which some of them had been engaged ; and they, in revenge, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police ; the boatmen, however, as he was going away, called to him that they would come at night and pull his house down ; in the middle of the night a great number of persons came about his house singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention. M., under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Holroyd, J. : " A civil trespass will not excuse the firing a pistol at a trespasser in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass. So if a man with force invades and enters into the dwelling of another ; but a man is not authorized to fire a pistol on every intrusion or invasion of his house ; he ought, if he has a reasonable opportunity, to endeavor to remove him without having recourse to the last extremity ; but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle ; and, therefore, in the eye of the law, it is equivalent to an assault ; but no words or singing are equivalent to an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence ; if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person, in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to manslaughter ; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he was, perhaps, justified in firing as he did." <sup>1</sup>

<sup>1</sup> On this case, Blackburn, J., in his evidence, in 1874, before the Homi-

§ 545. An interesting application of this doctrine is to be found in a case in Michigan in 1869.<sup>1</sup> In this case the evidence on part of the prosecution was that on the 17th of December, 1867, a few days after the defendant's marriage, several young men of the neighborhood met together to give him a mock serenade, called "horning." The defendant was living at the time with his father and mother, the latter an aged and sickly woman. The "horning" consisted of firing of guns, ringing bells, and yelling. When the defendant came out and ordered the party off, they dispersed. It appeared, however, that the defendant had notice that the

cide Bill Committee, thus comments: "I may illustrate what I mean by referring to a case that actually happened about fifty years ago. It was the case of the *King v. Mead*, and Sir Gregory, in the note put 'singing a song not an assault.' The case illustrated a great deal of this law. There was a good deal of smuggling going on in the East Riding of Yorkshire, and Mead was an active exciseman, and he and another had seized the goods belonging to Lowe, a farmer at the head of the smugglers there, and carried them off. Then they laid an information against Lowe, whom Lord Brougham defended, and he was acquitted; then they indicted him for perjury, and he was acquitted; then there was tremendous excitement, and Mead believed thoroughly that he was in danger of his life, and went about armed; and so far did it go that his companion was assailed near Scarborough, and very nearly murdered, and the smugglers were dragging him down to the sea when a body of the coast-guard rescued him. He left the country, but Mead remained in his house still armed; and one night Lowe and several others, who had been drinking, came riding past; they went to Mead's house, and came round it, and there was a great controversy as to what happened then; they undoubtedly sang an insulting song,

and hoisted Lowe up to the level of Mead's window. Mead shot at Lowe, and killed him on the spot, and was tried for murder. The first defence was that he shot him in defence of his house, which was his castle; but the evidence failed to show that Lowe was actually breaking into the house; then they said it was but manslaughter, for there was provocation, though that provocation was only singing a song; but the judge ruled that singing a song was not equal provocation to an assault. Then they were proceeding to give evidence of this assault on his comrade at Scarborough, which first the judge rejected; but upon their stating that they would give evidence that this which had been done to his comrade had been told to him, and had created the belief in his mind, that his life was in danger, he admitted it. The judge directed the jury that though these men were not actually breaking into the house, yet, if all the circumstances produced a real belief upon Mead's mind that they were breaking into the house with intent to kill him, that would amount not to justification, but to mitigate the crime from murder to manslaughter; and he got only imprisonment. That was Justice Holroyd's ruling, and I believe it to be law."

<sup>1</sup> *Patten v. People*, 18 Mich. 314.

party intended to return the next night. They did return ; and after the noise had been continued for some minutes, the defendant came out to the place where the party was collected, went back to the house, and then came back again, and went towards Cowles, the deceased, who was standing facing him with the butt of his gun on the ground. A blow was struck by the defendant at Cowles, who then was seen on his hands and knees ; the defendant struck a second blow, with an axe, at Cowles, who was knocked over, and subsequently died of the wound. " On the part of the defendant, it appeared that he resided with his father and mother, who were aged and infirm people ; that the old lady was quite feeble, and had for many years suffered from palpitation of the heart, and also from spells of dizziness ; that any unusual excitement brought on the palpitation of the heart, and any overdoing or prostration was likely to be followed by attacks of dizziness. That the defendant, on being aroused by the noise out of doors, went down-stairs ; that his mother was in great terror lest violence should be done. That she begged him to drive them off ; that he then stepped to the door and ordered them off ; they paid no attention to it ; the noise kept on ; he stepped to the door again, and took the axe and stepped out ; and several voices cried out, " Shoot him, damn him, shoot him ; " that as he stepped out towards them, the crowd sallied on to him, and he was struck with a gun or other weapon ; that he struck deceased and then went into the house, and that several gun wads were fired through the open door."

The defendant's counsel asked a witness for the prosecution, on cross-examination, " if Cowles did not tell him that the boys' running away the night before was a cowardly act, and that night they were going to get a company together, and go there and stand their ground. The prosecution objected, and the court sustained the objection." It was held by the supreme court that this rejection was erroneous. " It was not only the right but the duty of the prosecution," said Christiancy, J., " to show generally the transaction as a whole, its nature and its objects, whether its tendency should be to show the guilt or innocence of the defendant. This was not only necessary in fairness to the prisoner, but to enable the jury, from a view of the whole, to estimate and apply each particular item of evidence which might be adduced in any stage of the case. But whether the



prosecution did this or not, it was the clear right of the defendant, either by cross-examination, or by witnesses introduced in his defence, to go fully into all matters thus constituting the *res gestæ*. He could not be bound by the showing on the part of the prosecution, but was at liberty to show that the transaction as a whole, or in any of its parts or purposes, was different from that shown by the prosecution. And for this purpose it was competent for him to show any act or declaration of any individual of either assemblage in furtherance of the common object, or in reference to it, from the inception to the close of the transaction, — their combination or concert having already sufficiently been shown." It was further ruled, that if, from the defendant's knowledge of his mother's peculiar physical condition, he had reason to believe that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent, as though the danger to her life had resulted from an actual attack upon her person, or as though he was in the like danger from an attack upon himself; and he was justifiable in using the same means of protection in the one case as in the other.<sup>1</sup>

<sup>1</sup> "In the present case," said Christianity, J., "no actual attack had been made upon the defendant's house, nor forcible attempt to enter; and unless the defendant, when he stepped out of the house with the axe, was, as in his statement he claimed to be, actually struck by some one or more of the rioters, there was no actual attack made on the defendant, or any one of his family. There was, however, evidence tending to show that, when the door was standing open, and the defendant and his father and mother were ordering the rioters off, the wads from some of the guns were fired into the house. The evidence, also, tended to show that the defendant knew or understood that the general and original object of the rioters in assembling there was to annoy him and his family, by the blowing of horns, ringing of

bells, firing of guns loaded only with powder and wads, and by other noises, rather than personal injury to himself or any of his family.

"But there was also evidence that, before the defendant stepped out, there were threatening cries among the rioters 'to bring him (or fetch him) out,' or to 'bring or fetch them out,' which must have referred to the defendant, and perhaps to his wife, and possibly to his father and mother.

"Considering the case first with reference only to the facts existing prior to the time when the defendant went out with the axe, and without reference to the peculiar effects produced by the conduct of the rioters upon his mother, there was nothing, I think, in the evidence, fairly tending to show a state of facts, which

§ 546. Still more indulgently, so far as concerns the right of a person apparently defending his own house, was the law inter-

would justify or excuse the defendant in rushing out and attacking any of the rioters with an axe, or other dangerous weapon, for the purpose of compelling them to desist or leave, though he might have been excused for attempting to drive them off by force, and, even by blows, with any instrument not calculated to endanger life or limb. But though from the sudden, violent, and capricious impulses to which an excited mob is always subject, danger may always naturally be apprehended, especially about a man's dwelling at night, whatever the original object of the assemblage may have been, and no one can estimate the nature or extent of the danger — yet, until some actual violence had been done, or attempted, in this case against either the house or its inmates, the necessity which alone could excuse taking the life of any of the assailants had not yet occurred, and might never occur. And though the defendant had the right to act under the circumstances as they appeared to him, yet, up to this point (without reference to the defendant's mother), there was nothing in the circumstances which fairly tended to show that he could have believed the dire necessity to have arisen.

"We will next inquire how far the case may be affected by the peculiar effects produced upon the defendant's mother by the conduct of the rioters.

"There was evidence from which the jury might have found that, owing to the feeble health of the mother and her peculiar infirmities, the fear and excitement caused by the conduct and threats of the rioters produced upon her alarming effects, from which the defendant might well have apprehended her speedy death if such con-

duct were allowed to continue. But to render this available to the defendant as an excuse for the homicide, the jury should also find that the rioters were informed of this condition of the mother, and the effects produced by their conduct; or that every reasonable and practicable effort had been made to notify them of the facts,—as such are not the ordinary effects of such causes upon people generally, and, therefore, would not naturally be anticipated by the rioters. But if they had such notice, or the defendant was prevented from giving it by the noise and tumult of the rioters; then I can see no sound reason why the danger to the mother from their conduct should not have excused the conduct of the defendant towards them, to the same extent as if the danger to her life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him. And the defendant would, I think, have the right to resort to the same means of protection in the one case as in the other. What these means are, in what contingency they may be used, and how they are to be judged of by the defendant, will be considered under the next head.

"There was evidence — and the statement of the prisoner made on the trial must for this purpose be treated as such — from which the jury might have found (as supposed in part of the charge given by the court below) that the defendant took the axe from the house for the purpose of self-defence, and stepped out of the door, for the purpose of inducing the rioters to leave, or of dispersing them; and that, as he stepped out, the crowd cried out, 'Kill him, damn him, kill

preted by the supreme court of New York in 1838. The evidence was that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door bar, from which death ensued; and this being proved, it was held by Nelson, C. J., and Cowen, J. (Bronson, J., dissenting), that testimony that threats had been made a week before by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury under the instruction of the court; although it was intimated that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted.<sup>1</sup> Meade's case was cited by Cowen, J., who said, "there" (in Meade's case) "the death was occasioned by firing a loaded pistol. The case at bar presents the same circumstance of alarm one step more remote, the assailant not being identified with the previous

him,' and that rushing towards him, some one or more of them hit him with a gun or club or other weapon. If this hypothesis should be found to be true, instead of the charge given by the court, the jury should, I think, have been told substantially, that the defendant was excusable for acting according to the surrounding circumstances as they appeared to him; and if, from these circumstances, he believed there was imminent danger of death or great bodily harm to himself or any member of his family, then, if he had already tried every other reasonable means which would, under the circumstances, naturally occur to an honest and humane man, to ward off the danger or repel the attack, he might resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection; and if such means resulted in the death of any of the supposed assailants, the homicide would be excusable.

"It is not to be forgotten that the rioters assembled there for an illegal object; for the purpose, by their own confession, of a wanton and unprovoked insult and defiance to the defendant and his family; that the unpleasant, and, as it turned out, the terrible crisis, was forced upon the defendant against his will, by their criminal conduct. And while provocation, as such, cannot render the homicide excusable; yet, in estimating the nature and imminence of the danger, in the choice of means to avoid it, or the amount of force, or kind of weapon to be used in repelling it, the excitement and confusion which would naturally result from the surrounding circumstances, for which the rioters alone were responsible, should not be overlooked." "We cannot," it was further justly said, "require of the defendant, while in high excitement, the discretion to be exercised by a dispassionate observer."

<sup>1</sup> People v. Rector, 19 Wend. 569.

rioters. That, *per se*, however, would not so absolutely remove apprehension that the killing could not be referred to it. The jury might have laid no stress upon the circumstance; but I think it should have been received, because we cannot say they would not. The lightness of a relevant circumstance is no argument for withholding it from the jury.”<sup>1</sup>

<sup>1</sup> Bronson, J., however, held that Meade's case did not apply. “We are referred on this point to Meade's case, 1 Lewin C. C. 184, as cited in Roscoe's Cr. Ev. 645. There are some very important points of difference between that case and the one at bar. In that case, the boatmen, of whom Law, the deceased, seems to have been one, attacked Meade, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. As Meade was going away, the boatmen threatened him that they would come at night and pull his house down. In the middle of the night, Law and a great number of persons came about Meade's house, singing songs of menace and using violent language. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol by which Law, one of the party, was killed. Belt was also indicted with Meade, as having been present, aiding and abetting the alleged murder. Holroyd, J., among other things, said to the jury: ‘If you are of opinion that the prisoners were really attacked, and that Law and his party were on the point of breaking in, or likely to do so, and execute the threat of the day before, they were, perhaps, justified in firing as they did.’ In the case at bar, the pretended attack was not made the very next night after the threat of the rioters; a whole week intervened. The attack was not made by a great number of persons; there were only three young men; and the

knocking or kicking at the door for admittance was nothing more than the prisoner had been accustomed to hear, without any apprehension for the safety of his person or property.

“But what is very natural, there is no offer to prove that either of the three young men was of the party which had committed the riot, or had any connection or acquaintance with the rioters. Nor was there any offer to show that the prisoner supposed or believed, or had any reason to suspect or believe, that either of these three young men had anything to do with the previous disturbance, or the threatened assault on his house. There was no suggestion that either the rioters or the young men were strangers to the prisoner. So far as the offer goes, he may have known very well that the deceased and his companions had nothing to do with the previous disturbance. Surely, there is nothing in Meade's case to warrant the admission of such evidence as the prisoner proposed to give.

“It is not improbable that the prisoner knew the persons who had broken into his house, and abused the inmates a week before, especially as the case states that rioters had been admitted as guests in his house. But if he did not know their names, he might be very well able to distinguish between them and the three young men. It was ‘a clear, moonlight’ night, very light,’ when the deceased and his companions went to the house. The prisoner came to the window, and held a conversation with them before

§ 547. In Vermont, in 1873, the doctrine of Meade's case was affirmed, it being expressly declared that the use of deadly weap-

he made the attack, in which there was no intimation that he regarded them as rioters, or that they had ever done any act to excite his apprehension. But, aside from the probability that the prisoner knew the deceased and his companions had nothing to do with the previous assault, the offer did not go far enough to show any connection between the two transactions. Had the evidence been received, it would have furnished no just ground for the inference that the previous riot was at all in the mind of the prisoner at the time he made the attack. It was a mere after-thought—an attempt to get up and distract the minds of the jury with a collateral question utterly foreign to the point in issue.

"The bill of exceptions states the purpose for which the evidence was offered. It was to show that the defendant had reason to apprehend violence upon his house at the time the deceased and his companions came there, and that that was his reason for using so much force as he did. Here we have the inference which the prisoner wishes to draw from the evidence, and it is worthy of notice that he does not pretend that the evidence would warrant any inference that violence upon his house was to be apprehended from the deceased and his companions. He only contends that he had reason to expect violence at that time, but does not venture the suggestion that it was to come from the deceased or his fellows. What, then, do this offer and the inference from it come to? The prisoner says, rioters broke into my house a week before, abused the inmates, and threatened another attack; therefore, I had reason to apprehend violence upon my house at

the time the young men came there—not that I had any reason to expect violence from them, but from the rioters; this is my reason for sallying out of the house, and attacking the deceased with a dangerous weapon. It seems impossible to maintain that the evidence was admissible. The facts, if proved, would not furnish even a colorable pretence for the attack on the deceased. Although it is never necessary that the evidence offered should be conclusive, it is always essential that it should have a direct tendency to establish the point in controversy. A different rule would lead to the most mischievous consequences in trial by jury."

Nelson, C. J., held the evidence admissible on the following grounds: "With respect to the exclusion of the evidence on behalf of the prisoner, of a riotous assault upon his dwelling upon the night of the previous Saturday (seven days previous), and of the threat to return and repeat it, it may be proper to say a word. This proof was offered with a view to show that the prisoner had some ground for the apprehension of violence upon his dwelling and inmates when the deceased and his companions first appeared and commenced beating at the door; and that, under the influence of it, a degree of resistance was excusable, which might otherwise be considered disproportioned to the actual danger. That the law regards this sort of palliation for an excess of resistance in case of an unlawful assault upon the person or property of the citizen, is not denied; the only question here is, whether the proposed proof brought the case within it. If I had been sitting upon the trial, I would have admitted the evidence;

ons is permissible to avert an impending apparent felonious assault on the defendant or his household.<sup>1</sup>

though I cannot but see, looking at the whole case, that it could not possibly have had much effect upon the minds of the jury. If the new trial turned upon it, I might hesitate before granting it. It has already appeared that some of these rioters were subsequently admitted as guests in the house, — a fact that goes far to satisfy the mind that no well founded apprehension existed."

<sup>1</sup> *State v. Patterson*, 45 Vt. 308 ; 1 Green's C. R. 490.

In this case the evidence, as given by the reporter, was "that on the 24th of May, 1871, the respondent was living with his wife, mother, and sisters, in a tenement house in the village of St. Albans; that on the evening of that day, George W. Flanders, the decedent, and one Watson, being under the influence of liquor, went to the respondent's house, after he and his family had retired for the night, and knocking at the door asked to be let in; that the respondent raised the window of his room and told them that he did not want any one there, and that they could not come in; that they said they wanted to come in and talk with the respondent, and kept insisting upon being let in and remained some time, insisting, and grew more violent the longer they stayed, and repeatedly threatened to break the door down, and swore and used abusive language, and threw a brick or stone through the window; that one of them took off his hat, and commenced taking off his coat, and started towards the door, whereupon the respondent went into another room, and got a gun that he had used some days before, hunting, and which was loaded with shot, and put the barrel on the window-sill and fired, giv-

ing the said Flanders a mortal wound of which he died. The respondent testified that he fired to the ground, and that his object was, not to hit them, but to scare them away."

The respondent requested the court to charge that "the making of an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle." But the court refused so to charge; to which the respondent excepted. The court charged the jury that "if they were convinced beyond a reasonable doubt that the death of Flanders was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment. . . . That all killing of a human being is presumed to be unlawful; and when the fact of the killing is established, it devolves on the party who committed the act to excuse that killing — to show that it was justifiable — in order to escape the legal consequences which attach to the commission of the act;" to which the respondent excepted.

"It is not deemed needful for the purpose of this case, with reference to its future prosecution," said Barrett, J., in giving the opinion of the supreme court, "to discuss specifically any other subject, except that of the dwelling-house being one's castle, as bearing upon his right to kill or to use deadly weapons in defence of it. This is presented in the 3d request in behalf of the respondent, which is, in the language used by Holroyd, J., in charging the jury in *Meade's case*, *infra*; viz.: 'The making of an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's

§ 548. In California, in 1872,<sup>1</sup> the same point was affirmed under the following circumstances, as stated in the opinion of

house is his castle.' The purpose of this request seems to have been, to justify the killing with the gun, as a lawful mode and means of defending the *castle*, as well as the person within it. Looking to the state of the evidence, it is not altogether obvious what there was in the case to warrant its being claimed that the respondent killed Flanders, as a means of defending himself and his castle. It was claimed in behalf of the prosecution, and the evidence given in that behalf showed, that the gun was not fired at Flanders as a measure of force, to repel and prevent him from breaking into the house. Moreover, in the exceptions it is said, 'The respondent testified that he fired to the ground, and the object in firing was, not to hit them, but to scare them away.' The respondent seems not to have regarded it a case, or a conjuncture, in which it was needful or expedient to use a deadly weapon as a means of forceful resistance to meet and repel an assault on his house — whatever such assault in fact was — or to protect himself from any threatened or feared assault on his person. The gun loaded with powder alone would have served all the needs of the occasion, and of the exigency which the respondent supposed then to exist and to press upon him.

"Nevertheless, the point was made by said 3d request. It was indicated in the charge that the case, *State v. Hooker* (17 Vt. 670), was invoked in support of it, and it is cited in this court for the same purpose. That case professes to decide only the question involved in, and presented by it, viz : whether it was criminal under the stat-

ute for the respondent to resist an officer in the service of civil process within his dwelling-house, such officer having unlawfully broken into the house for the purpose of making such service. The language of the opinion is to be interpreted with reference to the case and the question. That case in no respect involved the subject of the use of a deadly weapon with fatal effect in defence of the castle ; and it is not to be supposed that the judge who drew up the opinion was undertaking to discuss or propound the law of that subject. . . .

"In a learned note in 2 Archb. Cr. L. 825, it is said: 'But when it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification, — that he shall not, except in extreme cases, endanger human life, or great bodily harm. . . . You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. It is therefore clear, that if one man deliberately kills another to prevent a mere trespass on his property, — whether that trespass could or could not otherwise be prevented, — he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own.'

"Harcourt's case, 5 Eliz. (stated 1 Hale P. C. 485-6), shows that this

<sup>1</sup> *People v. Walsh*, 43 Cal. 447.

the court given by Wagner, J. : " The shooting was not denied, but was claimed by the prisoner to have been excusable

doctrine is not new. 'Harcourt, being in possession of a house by title, as it seems, A. endeavored to enter, and shot an arrow at them within the house, and Harcourt, from within, shot an arrow at those that would have entered, and killed one of the company. This was ruled manslaughter, and it was not *se defendendo*, because there was no danger of his life from them without.' What was thus ruled is the key to the author's meaning in the next following paragraph of his book, which see.

"The idea that is embodied in the expression that a man's house is his castle, is not that it is his *property*, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant or members of his family; and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

"This is the meaning of what was

said by Holroyd, J., in charging the jury in Meade's case, 1 Lewin C. C. 184. Some exasperated sailors had ducked Meade, and were in the act of throwing him into the sea, when he was rescued by the police. As the gang were leaving, they threatened that they would come by night and pull his house down. In the middle of the night a great number came, making menacing demonstrations. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Meade was indicted for murder. Upon that state of facts and evidence, the judge said to the jury : 'A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger, &c. . . . But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return, &c. . . . There are cases where a person in heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an



under the circumstances. The prisoner was the clerk in charge at Coulter's Hotel, in Snelling, at which hotel deceased was a boarder, but not a lodger, and about two o'clock in the morning saw a man, who proved to be the deceased, seemingly in the act of getting into or out of a window of one of the rooms on the ground floor of the hotel. The man appeared to be balanced upon the sill of the window, with his feet hanging out; and the prisoner seems to have fired at him from another window of the same hotel. The ball entered the upper portion of the left thigh of the deceased, lodging in the right leg, between the knee and ankle. Tetanus subsequently set in, causing death in a few days. The evidence for the prisoner, he having been sworn upon his own behalf, was to the effect that, hearing a noise about two o'clock in the morning, seemingly a striking against the sash of a

opportunity so to do, fires on the impulse of the moment. In the present case, if you are of opinion that the prisoner was really attacked, and that the party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he, perhaps, was justified in firing as he did. If you are of opinion that he intended to fire over and frighten, then the case is one of manslaughter and not of self-defence.' . . . .

"The law of the subject, as given in the books thus cited and referred to, seems to have been adequately apprehended by the court, and, so far as we can judge from what is shown by the record before us, it was not administered erroneously or improperly in the trial, as against the respondent.

"If it were to be assumed that the defence might legitimately claim that there was an assault on the house, with the intent either of taking the life of the respondent, or doing to him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime; or if, under the existing circumstances attending the emer-

gency, the respondent had reason to believe, and was warranted in believing, and, in fact, did believe, that it was necessary in order to prevent the commission of such crime. In case the purpose of the assailant was to take life, or inflict great bodily harm, and the object of his attack (if there was such attack) upon the house was to get access to the inmate occupying the same, for such purpose, the same means might lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case, the point of justification is, that such use of fatal means was necessary in order to the rightful, effectual protection of the respondent, or his family, from the impending peril."

Yet this must be qualified by the introduction of the word "apparent." If a felonious attempt is *apparently* made, according to the defendant's honest belief, and if there be no negligence on his part in the act, then he is justified in taking life for the purpose of repelling the attack. See *Temple v. People*, 4 Lans. 119.

window, he jumped up — had a revolver in his hand — and seeing by a faint moonlight the legs of a man hanging out of the window of the room occupied by the children of Mr. Strong, the proprietor of the hotel, he fired, without knowing who the person in the window was, and without warning him, or inquiring of his business there. Upon the other hand, the evidence upon the part of the prosecution tended to show that the prisoner was not ignorant of who the deceased was when he fired at him; that he knew well that it was Atwill in the window; that in the room into which the window opened was a woman, in charge of the children of Strong, the landlord, and that for the favors of this woman the deceased and the prisoner were rivals; that the deceased, as he expressed it in his dying declaration, put in evidence, had “got the inside track of Walsh,” and had persuaded the woman to discard the latter altogether, and to swear fidelity to himself. The deceased was on a visit, or rather retiring from a visit to the woman, when he was shot. He had gone into the room at about twelve o'clock at night, and after remaining with her some two hours, was crawling out through the window, feet foremost, — detained for a moment in regaining his hat, which had been knocked off by the window-curtain — when Walsh shot him in the legs. The theory of the prosecution, in short, was that the shooting was malicious, and was prompted by feelings of jealousy and revenge upon the part of the prisoner towards the deceased.”

“The court refused to instruct the jury,” so continues the same learned judge, “that if they believed ‘that the defendant, having charge of the house, had reason to believe that the person trying to enter the house by the window, at the midnight hour, did so for the purpose of committing a felony or other unlawful act, then the jury will acquit.’ It is clear that the instruction as thus asked is not law. The phrase, unlawful act, as contained in the instructions asked, goes beyond the provisions of section twenty-nine of the Act concerning Crimes and Punishments, with reference to which the instruction was apparently drawn. Under the provisions of that section the killing would be justified only when the entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of assaulting or offering violence to some person dwelling or being therein, or for the purpose of committing a felony by violence or injury. The statute also

provides that a bare fear of any of these offences is not sufficient to justify the killing, but that it must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears, &c. (section 30). The instruction as asked omits to present to the jury the question as to whether or not Walsh did believe that the entry was being made for the purpose of committing a felony, and really acted under any fear that such an offence was about to be committed when he fired the shot. At the request of the prisoner, the court gave to the jury the eighth instruction, which is an exact copy of sections twenty-nine and thirty of the statute, and correctly set before them the rule by which their determination upon the point should be controlled; and in view of this instruction it can hardly be said, as claimed by the prisoner's counsel, that 'the charges, taken as a whole, exclude the idea that the defendant could act upon appearances in shooting deceased, but that there must have been actual, real danger,' as distinguished from mere apparent danger, sufficient to excite the fears of a reasonable person.

"At the instance of the prisoner the court instructed the jury as follows: 'A man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove the intruder without having recourse to the last extremity; but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle.' There was no error in refusing an instruction subsequently asked, to the effect that if the prisoner did not have a reasonable opportunity of removing the deceased, then he was justified in shooting him, and should be acquitted. 'A reasonable opportunity' is too vague an expression in this connection; besides, the facts appearing at the trial did not warrant the instruction as asked. The shot was fired without calling to the deceased to desist, or inquiring of him as to his purpose in being in the window of the hotel. There were no circumstances calculated to arouse the fears of a reasonable man, or indicating a danger so urgent or pressing as to excuse the instant use of a deadly weapon."<sup>1</sup>

§ 549. *Friends may unite in such a defence.* — When resist-

<sup>1</sup> See *Temple v. People*, 4 Lans. 119.

ance to a felonious attempt is concerned (*e. g.* burglary or arson, or felonious assault on the person), then the question of the ownership or of the purposes of the building does not come up. If such a felony is apparently attempted, and if it cannot be apparently prevented except by taking the life of the assailant, then any person is justified in taking such life.<sup>1</sup> Hence, not only the owner of the house, but his friends, neighbors, and *a fortiori* his servants and guests, may arm themselves for this purpose.<sup>2</sup>

§ 550. *What are "houses," within this exception.* — We must remember that there are two distinct aspects in which the relation of the "house" to the topic before us comes up. The first is that of self-defence; and it would seem to be clear that not only is an attacked person excused from further retreat when he is in his own house,<sup>3</sup> but that he has the same excuse when he is pursued into any building out of which he cannot escape without exposing himself to serious bodily harm when escaping. The difference between the two cases is this: that when in his own house he is not bound to escape, even though he could do so conveniently; but that if in the house of another, it is his duty, if he can conveniently and safely escape, to do so, and is not excused, if he can make such escape, in taking his assailant's life.

It is true that in an English case, where the prisoner was a lodger at a house to which there was a backway, of which the prisoner was ignorant, it being the first night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and illtreat him; Bayley, J., is reported to have said: "If the prisoner had known of the backway, it would have been his duty to have gone out backwards, in order to avoid the conflict."<sup>4</sup> But the true view is that the protection of the house extends to each and every individual dwelling in it; and it has been held that a lodger might justify killing a person endeavoring to break into the house where he lodged, with intent to commit a felony in it.<sup>5</sup>

So as parts of the dwelling-house are to be considered such out

<sup>1</sup> Supra, § 532.

487; Temple v. People, 4 Lansing,

<sup>2</sup> McPherson v. State, 22 Ga. 478; 119.

Pond v. People, 8 Mich. 23; De For-

<sup>3</sup> See supra, § 541.

rest v. State, 21 Ind. 23; People v.

<sup>4</sup> R. v. Dakin, 1 Lew. 166.

Walsh, 43 Cal. 447; Cooper's case,

<sup>5</sup> R. v. Cooper, Cro. C. 544. See 1

Cro. Car. 544; Semayne's case, 5 Co.

East P. C. c. 5, s. 57, p. 289; Fost.

92; Curtis v. Hubbard, 4 Hill N. Y.

274; and Ford's case, Kel. 51.

houses as are kept for the use of the family. Thus in a Michigan case, elsewhere fully cited, it was ruled that a building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. A fence, it was properly said, is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary out-buildings.<sup>1</sup>

§ 551. *So also homicide is justifiable in prevention of felonious attacks on buildings not dwelling-houses.* — It has been already noticed that when the question of justifiable homicide comes up (or homicide in prevention of a felony as distinguished from excusable homicide in self-defence), the test is the apparent felonious attempt. Hence the protection of the law is thrown, in this relation, over those who intervene to prevent an apparent felonious attack on a church or a bank.<sup>2</sup>

§ 552. *Right does not excuse killing intruder when in house.* — But when an intruder is in the house, the owner cannot kill him simply for refusing to leave. A man has a right to order another to leave his house, but has no right to put him out by force till gentler means fail; and if he attempt to use violence in the outset and is slain, it will not be murder in the slayer if there be no previous malice.<sup>3</sup> So it will be at least manslaughter if the owner of the house kills a visitor who has come in peaceably, though forbidden, and who refuses to leave when ordered out.<sup>4</sup>

Yet it must not be forgotten that if an intruder refuses to leave, he may be ejected by the employment of as much force as is requisite for the purpose.<sup>5</sup> At the same time we must remember that no greater force than is necessary to repel an intruder can be employed.<sup>6</sup>

<sup>1</sup> Pond v. People, 8 Mich. 150.

R. v. Sullivan, C. & M. 209. See supra, § 419, 420.

<sup>2</sup> Supra, § 213, 533, 539; Com. v. Daley, 4 Penn. L. J. 154.

<sup>3</sup> Hinton v. State, 24 Tex. 454;

<sup>4</sup> McCoy v. State, 3 Eng. (Ark.) 451; State v. Sloan, 47 Mo. 604; Greschia v. State, 53 Ill. 295. See supra, § 419, 420.

Lyon v. State, 22 Ga. 399; McCoy v. State, 3 Eng. (Ark.) 451; Penns. v. Robertson, Addison, 246; Reins v. People, 30 Ill. 356.

<sup>5</sup> State v. Smith, 3 Dev. & Bat. 117; McCoy v. State, 3 Eng. (Ark.) 451;

<sup>6</sup> Supra, § 419, 420.

In a case decided by the supreme court of Illinois in 1870, the evidence was that the deceased went to the room of the prisoner for a lawful purpose, and while there behaved himself properly, though some altercation occurred between them, and hard words were exchanged. The deceased, however, left the room and proceeded down a stairway, remarking, as he went, to the prisoner, "Go with all the money you have got; has n't your wife to beg every day?" To which the prisoner replied, "You go, you rascal, go." At this the deceased turned to go up the stairs again in an angry mood, when the prisoner said: "Come back; I will fix you." As the deceased advanced to the door of the prisoner's room, unarmed, in the act of entering, it being open, the prisoner seized a rolling pin, and wielding it with both hands, struck deceased three or four blows, fracturing his skull so severely that he died therefrom the following day. It was held by the supreme court that this was not a case of excusable homicide. If the use, so it was ruled, of a deadly weapon was not necessary, or apparently necessary in order to prevent the deceased entering the room of the prisoner, and committing, or offering to commit, an assault upon him, and he could reasonably and safely have avoided using the weapon, it was his duty to have done so, even though the deceased was returning to the prisoner's room with a quarrelsome intent.<sup>1</sup>

§ 553. *Killing by spring-guns, when necessary to exclude burglars, is excusable; when such guns are set bond fide, but negligently, it is manslaughter; when maliciously, murder.* — This topic has been already incidentally noticed.<sup>2</sup> We may here repeat the general principle, that a man is not justified in using instruments of destruction (*e. g.* spring-guns) for the defence of his property in any case in which he would not be justified in taking life if his house was actually assailed by a person with felonious intent. Such a gun may be used in a house to protect valuables there stored.<sup>3</sup> But it is negligence to plant such guns in a place where they would injure ordinary trespassers accustomed and likely to frequent such place.<sup>4</sup> We may therefore hold on this topic the following propositions: —

<sup>1</sup> *Greschia v. People*, 53 Ill. 295.

*State v. Moore*, 31 Conn. 479; *Bird v.*

<sup>2</sup> See *supra*, § 418.

*Holbrook*, 4 Bing. 628. See Wharton

<sup>3</sup> *Gray v. Coombs*, 7 J. J. Marsh. 478; *State v. Moore*, 31 Conn. 479.

on Negligence, § 347; *Townsend v. Wathen*, 1 East, 277.

<sup>4</sup> *Johnson v. Patterson*, 14 Conn. 1;

1. To place in a house, without notice, spring-guns, in such a way as to kill or seriously hurt any person entering, on whatever errand, is murder, if death ensues, and if the intent was to kill whosoever might thus enter.

2. To place in a house spring-guns, in the night-time, in such a way as to kill or seriously hurt persons entering through closed doors, without permission from inside, is, when death ensues (the intent being not to kill any one who may enter, but only burglars), manslaughter, if a mere trespasser, not entering with felonious intent, be killed. For under ordinary circumstances, the attaching of fatal weapons to doors, even with the intent to kill only burglars, is negligence.

3. To place before articles of peculiar value, inclosed in an iron safe, spring-guns, so as to kill any one seeking to open the safe without permission, is justifiable homicide, in case any person seeking to enter is killed.<sup>1</sup>

<sup>1</sup> In England it was originally held that the plaintiff, if he had notice of the spring-guns, could not recover for injury received by him. *Hott v. Wilkes*, 3 B. & A. 304; *Deane v. Clayton*, 7 Taunt. 518. Statutes followed making culpable injury by spring-guns or man-traps a criminal offence. See as to construction of statutes, *Wootton v. Dawkins*, 2 C. B. (N. S.) 412.

In *Jordin v. Crump*, *ut supra*, the rule is laid down that a person, passing with his dog through a wood, in which he knows dog-spears are set, has no right of action against the owner of the wood for the death or injury to his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured; because the setting of dog-spears was not in itself an illegal act, nor was it rendered so by the 7 & 8 Geo. 4, ch. 18. The cases are reviewed in able opinions by Sherman, J., in *Johnston v. Patterson*, 14 Conn. 1; and by Doe, J., in *Aldrich v.*

*Wright*, 53 N. H., reported in *Am. Law Times* for Feb. 1875, 49.

In *Kentucky* (*Gray v. Coombs*, 7 J. J. Marsh. 478), it has been ruled that a person having valuable property in charge may defend it at night by means of a spring-gun. In *State v. Moore*, 31 Conn. 479, it was held that the mere act of setting spring-guns on one's own premises, for their protection, is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected by it to any danger.

It was further said that as breaking and entering a shop in the night season with intention to steal is, by the law of Connecticut, burglary, the placing of spring-guns in such a shop for its defence would be justified, if the burglar should be killed by them. It was ruled, at the same time, that the guns would constitute a nuisance, if they cause actual danger to passers-by in the street; but the danger to the public must be of a real and substantial nature. It was therefore concluded,

## IV. EXECUTION OF THE LAWS.

§ 554. *Killing under mandate of law justifiable.*—The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country, is an act of necessity, where the law requires it.<sup>1</sup> But the act must be under the immediate precept of the law, or else it is not justifiable; and, therefore, wantonly to kill the greatest of malefactors without specific warrant would be murder.<sup>2</sup>

## V. SUPERIOR DUTY.

§ 555. *Risk of killing another in extreme cases to be preferred to certain death.*—It has already been observed that there are cases in which a surgeon, when called upon to determine whether a critical operation is to be performed, may undertake such operation, though the prospects of success are slight, if the alternative is a certain miserable death, in the natural progress of the disease.<sup>3</sup> So also, as will presently be seen, when the alternative is the sacrifice in childbed of the life of a mother or that of a child, the life of the child may be taken. So also, supposing that the safety of a city requires that a house should be destroyed by gunpowder, and supposing there be no time to rescue all the inmates of the house, the killing of one of such inmates, under the circumstances, would be excusable.

§ 556. Lord Macaulay, in his Report on the Indian Code, thus speaks :—

“There yet remains a kindred class of cases which are by no means of rare occurrence. For example, a person falls down in that where, upon a prosecution for a nuisance, the jury, by a special verdict, found that the defendant placed spring-guns in his shop for its protection against burglars; that the guns were loaded with large shot, and so placed as to discharge their contents obliquely towards the highway, the travelled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside and double boarded on the outside, but that it was possible that scattering shot might pass through

the boards at places where, by reason of the cracks between them, there was not a double thickness of boards; and that the travelling public were annoyed and apprehensive of harm from the guns,—that it did not appear that there was such real and substantial danger to the public as to warrant a conviction.

<sup>1</sup> Fost. 267.

<sup>2</sup> 1 Hale, 501; 2 Hale, 411. See this topic discussed fully supra, § 210.

<sup>3</sup> See supra, § 320.



an apoplectic fit. Bleeding alone can save him, and he is unable to signify his consent to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught in a blanket below, but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished."

§ 557. *Sacrifice of child's life in order to save the mother.*— This is one of the cases given by canonists and civilians as illustrating the doctrine before us. A woman is in such a state of labor that her life can only be preserved by the sacrifice of the life of the child. In this case it is not only the right but the duty of the attendants to sacrifice the life of the child. In our own law this position is indisputable.<sup>1</sup>

#### VI. NECESSITY.

§ 558. *Defence only good when danger is immediate, and when the life of the defendant can only be saved by the sacrifice of the deceased.*— The canon law, which lies at the basis of our jurisprudence in this respect, excuses the sacrifice of the life of one person, when actually necessary for the preservation of the life of another, and when the two are reduced to such extremities that one or the other must die,<sup>2</sup> . . . quoniam necessitas legem non habet.<sup>3</sup> Si quis propter necessitatem famia, aut nuditatis furatus fuerit cibaria, vestem, vel pecus; poeniteat hebdomadas tres, et, si reddiderit, non cogatur ieiunare.<sup>4</sup> Quod non est licitum in lege, necessitas facit licitum. So an eminent French jurist: <sup>5</sup> En un mot, l'acte ne peut-être excusable que lorsque l'agent cède à l'instinct de sa propre conservation, lorsqu'il se trouve en présence d'un péril imminent, lorsqu'il s'agit de la vie. In the same view leading German jurists unite.<sup>6</sup>

<sup>1</sup> See supra, § 320; infra, § 558.

<sup>2</sup> Can. 11. Dist. I. de consecrat.

<sup>3</sup> Cap. 3. X. de furt. (5. 18.)

<sup>4</sup> Cap. 4. X. de reg. iur. (5. 41.)

<sup>5</sup> Rossi, Traité II. p. 212.

<sup>6</sup> Berner, De impunitate propter

But it should be remembered that necessity of this class must be strictly limited. Hence it has been held by the canon jurists that the right can only be exercised in extremity, and in subordination to those general rules of duty to which even such a necessity as that before us must be subordinate. Hence when the question is between an unborn infant's life and a mother's, the mother is to be preferred; and between a sailor and a passenger, supposing there are more than enough sailors for the purposes of navigation, the passenger, as will presently be seen, must be preferred. So, where there is an opportunity to draw lots, lots must be drawn.

§ 559. *Not barred by culpability.* — It has been sometimes said that necessity can never be advanced as a defence when the necessity is the result of the defendant's own culpable act. This, however, as Berner<sup>1</sup> demonstrates, cannot be accepted as universally true. Thus a person who negligently causes a house to catch fire will not, by this negligence, be barred from setting up necessity as a defence, if, in rushing from a burning chamber, he should crush another in the throng; nor would a trespasser, who, upon stealing fish, should fall overboard, and in his struggle to save himself should upset a boat, be in like manner barred from setting up necessity, if life should thereby be accidentally lost, because his act which put him in this situation was wrongful.

§ 560. *Self-preservation in shipwreck.* — Upon the great authority of Lord Bacon it has been held that where upon two persons being shipwrecked, and getting on the same plank, one of them, finding it not able to save them both, thrust the other from it, whereby he was drowned, it is excusable homicide.<sup>2</sup> Lord Hale, however, doubts this, arguing that a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life, if he do not comply; so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.<sup>3</sup> To this Mr. East remarks,

summam necessitatem, &c. (1861); Geib, Lehrbuch, II. 225; and an interesting compendium in Holtzendorff, II. 180.

<sup>1</sup> Lehrbuch d. Strafrechts (1871), 140.

<sup>2</sup> 4 Black. Com. 186; Ruth. Inst. c. 16, p. 187-190; Puffendorf's Law of Nature, 204; Herbert's Legal Maxims, 7.

<sup>3</sup> 1 Hale, c. 28, s. 26.

that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion,<sup>1</sup> there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity; though, in case the party might have recourse to other means for his protection in his apparent necessity, his fears will certainly furnish no excuse for killing.<sup>2</sup>

§ 561. In this country this topic has undergone the test of a judicial investigation in a court, and under circumstances peculiarly favorable to its careful consideration. In March, 1842, Alexander William Holmes was indicted, in the United States circuit court for the Eastern District of Pennsylvania, before Baldwin, J., for manslaughter. From the evidence it appeared that the ship *William Brown* left Liverpool on the 13th day of March, 1841, having on board sixty-five passengers and a crew composed of seventeen seamen, the whole number amounting to eighty-two, most of the passengers being Irish and Scotch emigrants. The voyage was very favorable until the evening of the 19th of April, at which time, while all were in their beds except the watch, consisting of seven persons, among whom was Alexander William Holmes, the prisoner, a Swede by birth, the vessel struck an iceberg, and immediately commenced leaking. The sails were shortened, and resort was had to the pumps. Upon examination, it was found that the injury the vessel had received rendered her loss inevitable, and that the crew could only be saved, if saved at all, by taking refuge to the boats at once. The boats were immediately launched; in the long boat were crowded thirty-two passengers, besides a portion of the crew, in all forty-two persons; in the jolly boat were placed nine persons. The two boats pushed away from the ship, and the ropes by which they were attached to her were cut just before the ship went down. They remained together until the next morning when they separated. During the first day the weather was moderate and the sea calm. From the moment the long boat reached the water it was necessary to bail; she was leaky, and the plug was insecure and insufficient for the purpose. She was so loaded that the gunwale was but a few inches from the water. Towards evening the sea became rough, and at times washed over the sides of the boat. On the second night, not much more than twenty-four hours after

<sup>1</sup> 1 East P. C. c. 2, s. 15.

<sup>2</sup> Ibid. c. 5, s. 61.

the abandonment of the ship, the sea becoming more and more tempestuous, and the danger of destruction imminent, the defendant, together with the remaining sailors, proceeded to throw overboard those passengers whose removal seemed necessary for the common safety. Relief shortly afterwards came, but great conflict of evidence existed as to whether the boat could have held out in its original crowded state even during that short period. The question, therefore, whether, with no prospect of aid, acting under the circumstances which surrounded the defendant at the time the act was committed, such necessity existed as would justify the homicide was one of great doubt. But a new principle was introduced into the case by the learned and able judge who presided. Holding that in such an emergency, there was no maritime skill required which would make the presence of a sailor of more value than that of a passenger, he maintained, with great power of argument, that in such case, it being the stipulated duty of the sailor to preserve the passenger's life at all hazards, if a necessity arose in which the life of one or the other must go, the life of the passenger must be preferred. If, on the other hand, the crew was necessary, in its full force, for the management of the vessel, the first reduction to be made ought to take place from the ranks of the passengers. But under any circumstances, it was held the proper method of determining who was to be the first victim out of the particular class, was by ballot. The defendant, under the charge of the court, was convicted, but was sentenced to an imprisonment of light duration.<sup>1</sup>

<sup>1</sup> U. S. v. Holmes, 1 Wall. Jr. 1.

In Mr. Fitzjames Stephen's Homicide Amendment Bill occurs the following passage:—

"Homicide is not criminal when the person killing is unable to save his own life from imminent and extreme danger except by killing the person killed; but this section shall not apply" (giving exceptions). In criticising this, Baron Bramwell said: "I am sure I do not know that I should like to see the parliament of the United Kingdom of Great Britain and Ireland say, that if I was floating on my plank, and anybody else was

floating on his plank, he had a right to turn me off my plank, and take my plank and drown me and save himself. I do not suppose, however, he would be hanged for doing it now." To this Mr. Stephen replied: "In this answer he seems to have altered the case, which supposes that there is only one plank." "The next question and answer," says Mr. Stephen, proceeding with his criticism of the prior evidence, "is this: 'I suppose there is authority for it in the books?' asked the chairman, and the answer is: 'I do not know. I have not had time to look at it. I should doubt it

extremely.” Mr. Russell Gurney then said: “Lord Hale is an authority, I suppose?” “More than that. You begin with Bracton first of all, where he says that homicide may be ‘*necessitate quo casu distinguendum erit utrum necessitas illa fuit evitabilis vel non. Si evitabilis, et evadere possit absque occisione tunc erit reus homicidii. Si autem inevitabilis, quia occidit hominem sine odii meditatione, in metu et dolore animi, se et sua literando, cum aliter evadere non possit, non tenetur ad poenam homicidii.*’ That is the original authority. If you went to Roman law, you would probably find earlier authority.” — Mr. Gurney: “That is homicide *se defendendo*?” — Mr. Stephen: “It is very broad language, and no doubt that might be included. Bracton is really older than the common law itself. The next authority is Bacon’s *Maxims*; it is the fifth maxim: ‘*Necessitas inducit privilegium quoad jura privata.*’ Then he quotes this case about the two men on the plank. All those cases are collected in 1 Russell, 892. Bacon has been repeated by Dalton, and repeated by East, and repeated by Russell in the ordinary way. And you will find in the Indian Penal Code, section 81, a section somewhat like this, though not quite the same. I say that to show that it is not my invention. Then Baron Bramwell makes this suggestion, of which he says afterwards that the original credit is due to another learned judge, Baron Cleasby: ‘Then there is another thing upon that which I did not call Mr. Stephen’s attention to, or mention in my notes to the home secretary, but I am not at all clear that it does not include, indeed I think it does include, this case. A highwayman attacks me, and I turn out to be the better man, and he is getting the worst of it, and kills me;

would not that be a case under section 17? If so, that is wrong. It “is not criminal when the person killing,” that is the highwayman, “is unable to save his own life from imminent and extreme danger, except by killing the person killed,” that is me.’ Now, it is almost impossible to imagine a case in which a highwayman might not save himself from imminent and extreme danger by throwing down his arms and giving himself up to be arrested; and so long as he was able to do that, the question would not arise. I might, perhaps, illustrate the difficulties of that subject, if we are to go into it, by a case which I actually heard tried, which, by the way, shows that the right of self-defence might arise, even in a criminal. I think Mr. Bristowe heard the case too. That case is this: There was a man tried for burglary at Derby; there was a very old fellow, a man turned of eighty, upon whom the burglary had been committed, who came up as the principal witness. He gave an account of how he was asleep in bed, and woke up and heard burglars, and got up with an axe, and how, when the man came up-stairs, he cut him over the head and knocked him down, and the man fell from the top to the bottom of the stairs, and lay ‘snoring’ at the bottom of the stairs; I suppose he meant groaning. Towards morning, this man, with his head split open, crawled off into an out-house in the neighborhood, and while he was lying there absolutely helpless and almost dying, the old man went out and found him in the out-house. He was asked: ‘What did you do when you saw him?’ he said, with the greatest calmness: ‘I took a thick stick and broke his jaw.’ Suppose, instead of breaking his jaw, the old man had taken a revolver and began to fire at him, which would only have been a little more outrageous, is

it to be said that if the burglar had had a pistol he might not have defended his life by firing back at him? I think it would be very hard to say so. Mr. Justice Blackburn goes into this matter also, and he says that the case about the two men on the plank was a moot point in the days of Cicero, which he seems to have felt rather a reason in favor of its continuing to be a moot point. However, he further says: 'Suppose you had the case of a slaver throwing his slaves overboard to avoid loss of life; ought not that to be murder?' Well, if I was pressed to say, I should say, no, it ought not; because it seems very absurd, that if by throwing fifty slaves overboard, you could save the lives of the rest, that would be murder, if you could not save any one in any other way. Of course it would be a very wrong thing to take the slaves at all."

Lord Macaulay, in his Report on the Indian Code, says:—

"It would, we think, be mere useless cruelty to hang a man for voluntarily causing the death of others by jumping from a sinking ship into an overloaded boat. The suffering caused by the punishment is, considered by itself, an evil, and ought to be inflicted only for the sake of some preponderat-

ing good. But no preponderating good, indeed, no good whatever, would be obtained by hanging a man for such an act. We cannot expect that the next man who feels the ship in which he is left descending into the waves, and sees a crowded boat putting off from it, will submit to instant and certain death from fear of a remote and contingent death. There are men, indeed, who in such circumstances would sacrifice their own lives rather than risk the lives of others. But such men act from the influence of principles and feelings which no penal laws can produce, and which, if they were general, would render penal laws unnecessary. Again, a gang of decoits, finding a house strongly secured, seize a smith, and by torture and threats of death induce him to take his tools and to force the door for them; here, it appears to us, that to punish the smith as a housebreaker would be to inflict gratuitous pain. We cannot trust to the deterring effect of such punishment. The next smith who may find himself in the same situation will rather take his chance of being, at a distant time, arrested, convicted, and sentenced to imprisonment, than incur certain and immediate death.'

## CHAPTER XVI.

### INSANITY AND DRUNKENNESS.

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| <p>I. DEFENDANT IS TO BE HELD IRRESPONSIBLE WHEN, AT THE COMMISSION OF THE HOMICIDE, HE WAS INCAPABLE OF DETERMINING WHETHER THE ACT WAS RIGHT OR WRONG, § 564.</p> <p>II. DEFENDANT IS TO BE HELD IRRESPONSIBLE WHEN HE DID THE ACT UNDER AN INSANE DELUSION THAT IT WAS EITHER RIGHT OR EXCUSABLE, § 567.<br/>         Delusion a defence only when producing the homicide, § 572.<br/>         Prosecution may dispute the insanity of the delusion, § 573.</p> <p>III. DEFENDANT IS TO BE HELD IRRESPONSIBLE WHEN, BEING INSANE, HE IS FORCED BY A MORBID AND</p> | <p>IRRESISTIBLE IMPULSE TO DO THE PARTICULAR ACT, § 574.</p> <p>IV. "MORAL INSANITY" IS NO DEFENCE, § 583.</p> <p>V. MENTAL DERANGEMENT, THOUGH NOT CONSTITUTING TOTAL INSANITY, MAY BE PUT IN EVIDENCE TO LOWER THE GRADE OF GUILT, § 584.</p> <p>VI. BURDEN OF PROOF, § 585.</p> <p>VII. DRUNKENNESS, § 586.<br/>         When producing settled insanity, to be governed by the rules as to insanity, § 587.<br/>         When producing temporary insanity, and is voluntarily induced, does not destroy responsibility, § 588.<br/>         In any view may be proved to determine degree, § 589.</p> |
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§ 563. THE subject of responsibility for crime, in its general bearing, has been discussed in other treatises.<sup>1</sup> As, however, the defence of insanity is rarely taken except in homicide cases, it may be proper here to give in brief the main conclusions adopted in the treatises to which reference has been made.

I. THE DEFENDANT IS TO BE HELD IRRESPONSIBLE WHEN, AT THE COMMISSION OF THE HOMICIDE, HE WAS INCAPABLE OF DETERMINING WHETHER THE ACT WAS RIGHT OR WRONG.

§ 564. No question exists as to the soundness of this position; nor is it necessary that the incapacity as to right and wrong should be general. It is enough if such incapacity be shown to have existed in reference to the particular act.<sup>2</sup>

<sup>1</sup> See 1 Whart. & St. Med. Jur. 3d ed.; Whart. Cr. Law, 7th ed. § 15. 573, 673 (n); R. v. Oxford, 9 C. & P. 533; Burrow's case, 1 Lewin, 238; R.

<sup>2</sup> 1 Inst. 247; Bac. Abr. Idiot; Co. Litt. 247 (a); 1 Russ. on Cr. by Par. Deb. 728; Bowler's case, Hadfield's case, Ibid. 480; 27 How St. Tr. 1316; Com. v. Rogers, 7 Metc. 500; Black. Com. 24; Collinson on Lunacy,

§ 565. To this effect is the answer of the fifteen judges of England to the questions propounded to them by the house of lords, in June, 1843. "The jury," they said, "ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."<sup>1</sup>

§ 566. In this country, whatever may have been the hesitancy as to the enunciation of the other propositions to be hereafter stated, there has been none as to this. There has scarcely been a case in which the defence of insanity has been taken, in which the jury have not been told that if the defendant was unable "to distinguish right from wrong," or to discern "that he was doing a wrong act," or was "not conscious of the moral turpitude of the act," or was "deprived of his understanding and memory," or was "ignorant that he was committing an offence against the laws of God and nature," he was irresponsible.<sup>2</sup> And

7 Bost. Law Rep. 449; *Com. v. Mosler*, 4 Barr, 267; *Freeman v. People*, 4 Denio, 10; *Flanagan v. People*, 52 N. Y. 467; *State v. Spencer*, 1 Zabriskie, 196; *State v. Gardner*, Wright's Ohio R. 392; *Blackburn v. State*, 23 Ohio St. 165; *Com. v. Farkin*, 3 Penn. L. J. 482; *Vance v. Com.* 2 Virg. C. 132; *McAllister v. State*, 17 Alab. 434; *U. S. v. Shultz*, 6 McLean, 121; *People v. Sprague*, 6 Parker C. C. 43; *Dove v. State*, 3 Heisk. 348; *R. v. Barton*, 3 Cox C. C. 275; *R. v. Offord*, 5 C. & P. 168; *R. v. Higginson*, 1 C. & K. 129; *R. v. Stokes*, 3 C. & K. 185; *R. v. Layton*, 4 Cox C. C. 149; *R. v. Vaughan*, 1 Cox C. C. 80.

<sup>1</sup> 1 Car. & Kir. 134; 8 Scott N. R. 595. See *State v. Huting*, 21 Mo. 464; *R. v. Layton*, 4 Cox C. C. 148; *R. v. Barton*, 3 Cox C. C. 275; 1 Ben-

nett & Heard Lead Cases, 942; *R. v. Davies*, 1 F. & F. 69; *R. v. Watson*, and *R. v. Edmunds*, cited 1 W. & S. Med. Jur. (1873) § 167-9.

<sup>2</sup> See more particularly, *Com. v. Rogers*, 7 Metc. 500; *Com. v. Mosler*, 4 Barr, 267; *Com. v. Farkin*, 3 Penn. L. J. 482; *Freeman v. People*, 4 Denio, 10; *State v. Huting*, 21 Mo. 464; *U. S. v. Clark*, 2 Cranch C. C. R. 158; *U. S. v. Shultz*, 6 McLean C. C. R. 121; *McAllister v. State*, 17 Alab. 434; *Vance v. Com.* 2 Virg. C. 132; *People v. Pine*, 2 Barbour, 571; *People v. Sprague*, 2 Parker C. R. 48; *Willis v. People*, 5 Tiffany, 715; *Choice v. State*, 31 Ga. 424; *Anderson v. State*, 42 Georgia, 11 (1871); *People v. Coffman*, 24 Cal. 230; *Com. v. Heath*, 11 Gray, 303; *State v. Lawrence*, 57 Me. 574.



it has been further properly held that when idiocy or semi-idiocy is proved, it is for the prosecution to establish affirmatively a capacity on part of the defendant to distinguish right from wrong.<sup>1</sup>

II. THE DEFENDANT IS TO BE HELD IRRESPONSIBLE WHEN HE DID THE ACT UNDER AN INSANE DELUSION THAT THE ACT WAS EITHER RIGHT OR EXCUSABLE.

§ 567. The question propounded to the English judges on this point was: "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" "To which question," they replied, "the answer must of course depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to

It is in England that the right and wrong test is applied with the most exclusive rigor; and it is in England that attempts at its formal expansion have been most stoutly resisted. See 1 W. & S. Med. Jur. § 119. Yet, in deciding what is the amount of evidence necessary to prove incapacity to determine between right and wrong, the English judges have practically let in constructions almost as indulgent as those which have led American courts to expand the formal definition of the offence. Thus a married woman having killed her husband immediately after an apparent recovery from a disease (the result of childbirth) which caused a great loss of blood, and exhausted the vessels of the brain, and thus weakened its power, and so tended to produce insane delusions of the senses, which, while suffering under such disease, she complained of, and which, by her own account, had been renewed at the time of the act of homicide (although they were not such as would lead to it): these facts were held by Erle, J., to be evidence from which a jury

might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it. *R. v. Law*, 2 F. & F. 836.

So also where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design; but it appeared that there was insanity in her family, and from her demeanor before and after the act, which, although not wholly irrational, yet was strangely erratic and excited; and from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations, the medical men were of opinion that she was laboring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act; this was left by Wightman, J., to the jury, as evidence on which they might rightly find her not guilty on the ground of insanity. *R. v. Vyse*, 3 F. & F. 247.

<sup>1</sup> See *State v. Richardson*, 39 Conn. 591.

responsibility, as if the facts with respect to which the delusion exists were real. For example: If, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

§ 568. What is here declared in reference to an insane agent is the same as is declared<sup>1</sup> as to a sane agent. When a man shoots another under an honest and non-negligent belief that the latter is a burglar seeking to commit a felony, the act is excusable, even though the belief was a mistake. And so a belief, mistaken though it be, that I am in immediate danger of my life, will relieve me from the guilt of murder in killing my supposed assailant. If I really believe myself so attacked, and in such immediate danger, and if I am not chargeable with negligence in adopting such belief, then I am entitled to an acquittal. If, however, the belief, though honest, was negligent on my part, then I am guilty of manslaughter.<sup>2</sup> The same principle is, *a fortiori*, applicable to cases where the delusion is insane. But this insanity must be not *moral* but *mental*.<sup>3</sup>

§ 569. That an insane delusion, as to the value or meaning of human life, will have this effect, even though the party himself knows when committing the act that he is doing wrong, and is violating the laws of the land, is illustrated by Lord Erskine in a well known case: "Let me suppose," he said, "the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and such cases have existed), and that upon the trial of such a lunatic for murder, you, being on your oaths, were convinced, upon the uncontradicted evidence of one hundred persons, that he believed the man he had destroyed to have been a potter's vessel; that it was quite impossible to doubt that fact, although to other intents and purposes he was sane, — answering, reasoning, acting as men not in any manner tainted with insanity, converse and reason and conduct themselves. Suppose, further, that he be-

<sup>1</sup> See *supra*, § 493.

<sup>2</sup> See *supra*, § 527.

<sup>3</sup> See *R. v. Benton*, 3 F. & F. 772; *Wesley v. State*, 37 Miss. 327.

*R. v. Townley*, 3 F. & F. 839. See, however, as controverting the text,

lieved the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another, and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious; and that, in short, he had full knowledge of all principles of good and evil; yet would it be possible to convict such a person of murder, if, from the influence of the disease, he was ignorant of the relation in which he stood to the man he had destroyed, and was utterly *unconscious* that he had struck at the life of a human being?"<sup>1</sup>

§ 570. Again: in a case which has more than once occurred within the walls of a lunatic asylum, a man fancies himself to be the Grand Lama, or Alexander the Great, and supposes that his neighbor is brought before him for an invasion of his sovereignty, and he cuts off his head or throttles him. He knows he is doing wrong; perhaps, from a sense of guilt, he conceals the body; he may have a clear perception of the legal consequences of his act. In such a case criminal responsibility, in the full sense of the term, does not exist. It was in conformity with this view, in a case where it was proved that the defendant had taken the life of another under the notion that he was set about with a conspiracy to subject him to imprisonment and death, that Lord Lyndhurst told the jury that they might "acquit the prisoner on the ground of insanity, if he did not know, when he committed the act, what the effect of it was with reference to the crime of murder." What, therefore, he in fact decided was, that a man who, under an insane delusion, shoots another, is irresponsible when the act is the product of the delusion. Such indeed, on general reasoning, must be held to be the law in this country, and such will it be held to be when any particular case arises which requires its application.

§ 571. In England this view has been recognized in several cases, notwithstanding the reluctance of the courts in that country to enlarge the boundaries of insane irresponsibility. Thus on the trial of Hadfield, who could distinguish between right and wrong, but who was under a delusion that it was his duty to offer himself as a sacrifice for his fellow-men, and that his shortest way of so doing was to kill the king, which he knew to be morally wrong, Lord Kenyon, on these facts being made out,

<sup>1</sup> Winslow on Plea of Insanity, 6.

advised a withdrawal of the prosecution. The same course was followed by Chief Justice Tindal in *Macnaghten's case*, when, on a trial for shooting at Mr. Drummond, the private secretary of Sir Robert Peel, a similar delusion was proved.<sup>1</sup> In the ecclesiastical courts, the existence of delusions or hallucination on material points has frequently been held to so far constitute insanity as to *pro tanto* destroy testamentary capacity.<sup>2</sup> In this country, the legitimacy of such a defence in criminal cases has been in several instances specifically recognized.<sup>3</sup>

§ 572. *Delusion a defence only when homicide was its product.*—A delusion, however, is no defence, unless the homicide was its immediate product. If the defendant was sane as to the crime, but insane on other topics, the insanity in the latter respect will not save him.<sup>4</sup> The crime must have been the result of the delusion.

<sup>1</sup> See also *R. v. Brixey*, and *R. v. Touchett*, cited in 1 Bennett & Heard's *Lead. Cases*, 100. So also, on an indictment for maliciously setting fire to a building, it is not necessary to prove actual ill-will in the prisoner towards the owner; and in order to justify a jury in acquitting a prisoner on the ground of insanity, they must believe that he did not know right from wrong; but if they find that the prisoner, when he did the act, was in such a state of mind that he was not conscious that the effect of it would be to injure any other person, this will amount to a general verdict of not guilty. *R. v. Davies*, 1 F. & F. 69—Crompton.

<sup>2</sup> *Dew v. Clarke*, 1 Adams E. R. 279; *Frere v. Peacocke*, 1 Robertson, 442; 1 W. & S. Med. Jur. § 34-60.

<sup>3</sup> *Roberts v. State*, 3 Georgia, 310; *People v. Pine*, 2 Barbour, 571; *Com. v. Rogers*, 7 Metc. 500; *State v. Windsor*, 5 Harr. 512; *U. S. v. Holmes*, 1 Clifford, 98; *Com. v. Freth*, 3 Phil. Rep. 107; 1 W. & S. Med. Jur. § 134.

<sup>4</sup> *State v. Huting*, 21 Mo. (6 Bennett) 464; *Bovard v. State*, 30 Miss. (1 George) 600; *Com. v. Mosler*, 4

*Barr*, 264; *State v. Gut*, 13 Minn. 341; *State v. Lawrence*, 57 Me. 574.

The following is from Mr. Fitzjames Stephen's testimony before the English Homicide Committee in 1874 :

"With regard to the law upon that subject, the standard authority, as the committee of course are well aware, is the opinion of the judges, given in *Macnaghten's case*, although, of course, the committee are also aware that very eminent judges have doubted the constitutional propriety of putting abstract questions of that kind to the judges, and getting such answers from them. I have heard more than one of the most eminent judges on the bench express themselves as being doubtful with regard to that authority on that ground. However, as a matter of fact, I think it will not be doubted that that at the present day is generally regarded as the leading authority upon the subject of insanity.

"Now as to that authority, I think this section varies from it slightly, but it varies from it by clearing up what I have always regarded as an ambiguity in the judgment as to a mat-

§ 578. *Prosecution may dispute the insanity of the delusion.*  
— Where an *insane* delusion is set up, it has been held admis-

ter upon which the judges may possibly not have felt themselves called upon to give any opinion. They say, that in order that a man may be excused by insanity from the consequences of his crime, it must be shown that he did not know that what he was doing was wrong. When the answers were returned to the house of lords, there was a debate upon that, and in the debate on that subject Lord Brougham objected, and said that it ought to be that he did not know that what he was doing was forbidden by law, and that the word 'wrong' should not be used.

"If the subject is considered too delicate for legislation at all, it might be said, 'homicide is not criminal if the person committing it is not in a state to be by law responsible for his acts;' but I will just give an illustration of each of these sub-sections. Sub-section (a) is as follows: 'Homicide is not criminal if the person by whom it is committed is, at the time when he commits it, prevented by any disease affecting his mind (a) from knowing the nature of the act done by him.' A. is, by a disease affecting his mind, led to suppose that B. is a wild animal, and shoots him accordingly. It is not denied that in that case insanity excuses him. Then comes sub-section (b), 'from knowing that it is forbidden by law.' That is universally admitted; the narrowest interpretation of the judges' opinions in *Macnaghten's* case would allow that; and it would produce this curious result, which, however, sufficiently explains what it means. Suppose a man were under an insane delusion that an act of parliament had been passed by which murder had ceased to be criminal; then, if he

goes and shoots anybody, according to that interpretation, he is freed from the consequences of his crime. Sub-section (c) excuses a person prevented by disease affecting his mind 'from knowing that it (his act) is morally wrong.' The word *morally*, p. 9 (his act), is considered as enlarging the existing law. I cannot believe that it does, and I will put one or two illustrations upon the subject which are real illustrations (I have seen them stated, at least, in works which profess to be authorities), and which seem to me to show conclusively that this is not too wide.

"There was a case in which a man was under the delusion that he was Jesus Christ; that sort of delusion, I believe, is not uncommon; he also thought that it was essential for the salvation of the world that he should be put to death, and he further thought that it would spoil the effect of his being put to death if he were to kill himself, because it would be wicked. Therefore, in order that he might be hanged, and the world might be saved, he went and murdered somebody else. Now, if you interpret the word 'wrong' as meaning not morally wrong, but forbidden by law, that man ought to have been hanged, because he not only knew that the act was forbidden by law, but the very reason why he did it was because it was forbidden by law.

"I can hardly argue with anybody who says that a man in such a monstrous state of mind as that ought to be hanged. Taking those as illustrations, you have two men before you; the one man commits a murder because he is under an insane delusion that parliament has passed an act authorizing him to do so, and he is

sible for the prosecution to show that the delusion was one attributable to ordinary processes of reasoning.<sup>1</sup> But it does not follow, supposing the delusion to be that of a *sane* and not of an *insane* person, that the defendant is to be convicted of murder. If the delusion is honestly and non-negligently adopted, and if he act under its immediate pressure, then the case, with the qualifications already stated, is one of excusable homicide.<sup>2</sup> If the delusion is honestly but negligently adopted, then the case is one of manslaughter.<sup>3</sup> If the delusion is a dishonest pretext, the defendant should be convicted of murder.

III. THE DEFENDANT IS TO BE HELD IRRESPONSIBLE WHEN, BEING INSANE, HE IS FORCED BY A MORBID AND IRRESISTIBLE IMPULSE TO DO THE PARTICULAR ACT.

§ 574. In order to clear the question at the outset from ambiguities, it is proper to remark : —

a. "Irresistible impulse" is not "moral insanity," supposing "moral insanity" to consist of insanity of the moral system,

not to be hanged, but to be confined in a lunatic asylum. The other man commits a murder under the monstrous delusion which I have mentioned, and he is to be hanged because he knew what he did was forbidden by law. I do not think the public would ever agree to that.

"That leads me to ask if it is admitted that the second man is not to be hanged, why is he not to be hanged? The answer is: he is not to be hanged because he is not in the state of mind which the law presumes in those whom it addresses and threatens. When you pass a law punishing a man for a crime you are dealing with a reasonable being; you are dealing with a being whom you presume to know that on a great many familiar grounds, quite independent of any mere fear of punishment, he ought not to commit crime; who knows, for instance, that if he does commit a murder he causes extreme distress, and great fear, and, it may be, ruin to his neighbors, and does a thing cruel and

brutal in itself. That is the assumption on which all criminal law proceeds, that is addressed to ordinary reasonable beings; but it seems to me that if a man by bodily disease is placed in such a position that he cannot feel that at all, and that he does not know the nature of this act, and the consequences of it, he ought to be locked up in a lunatic asylum,—and that exactly as much whether the nature of his delusion does or does not prevent him from remembering that the law has forbidden his act. I think that the illustration which I have given (and I could give twenty such) conclusively shows that when you are dealing with a person under those circumstances, the prospect of being punished by law, the mind being perverted by madness, may actually be an inducement to commit crimes."

<sup>1</sup> State v. Pike, 49 N. H. 399.

<sup>2</sup> See supra, § 493.

<sup>3</sup> See supra, § 527.

coexisting with mental sanity. "Moral insanity," as thus defined, has no support, as will hereafter be seen,<sup>1</sup> either in psychology or law.

δ. Nor is "irresistible impulse" convertible with passionate propensity, no matter how strong, in persons not insane.<sup>2</sup> In other words, the "irresistible impulse" of the lunatic, which confers irresponsibility, is essentially distinct from the passion, however violent, of the sane, which does *not* confer irresponsibility.

§ 575. The first leading American case in which this defence was advanced is that of Rogers, decided by the supreme court of Massachusetts, in the spring of 1844.<sup>3</sup> Chief Justice Shaw, who delivered the charge, began by laying down two propositions of great breadth. "In order to constitute a crime," he says, "a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, *or* if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. These extremes," he then proceeds to state, "are easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging; or so perverted by insane delusion, as to act under false impressions and influences." To such cases,—to those where the mind is not "incapable of judging," &c., and to those where it acts "under false impressions and influences,"—and to such alone, he applies the "right and wrong" test; reserving to it a very small sphere of action, since the defence of insanity would scarcely be ventured where there was both a capacity to judge, reason, and remember, and a freedom from false "impressions and influences." Taking up the particular defence of monomania, which was that advanced in the case before him, he pro-

<sup>1</sup> See this argued at large 1 W. & S. Med. Jur. (1873) § 137. fulness, in pamphlet shape, by Messrs. Bemis & Bigelow, and is incorporated,

<sup>2</sup> 1 W. & S. Med. Jur. (1873) 144. in a condensed form, in the seventh volume of Mr. Metcalf's Reports, p. See *State v. Pike*, 49 N. H. 399.

<sup>3</sup> This case is reported with great 500.

ceeds to state the law with a liberality in entire accordance with the views herein expressed. "This" (monomania) "may operate as an excuse for a criminal act in one of two modes.

1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act: as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature. 2. Or this state of delusion indicates to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in homicide, or other violent acts toward friend and foe indiscriminately; so that, although there were no previous indications of violence, yet the subsequent act connecting itself with the previous symptoms and indications, will enable an experienced person to say, that the outbreak was of such a character that for the time being it must have overborne memory and reason; that the act was the result of the disease and not of a mind capable of choosing; in short that it was the result of uncontrollable impulse, and not of a person acted on by motives, and governed by will." . . . "Are the facts of such a character, taken in connection with the opinion of professional witnesses, as to induce the jury to believe that the accused was laboring for days under monomania, attended with delusion, and did thus indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the diseased was not an accountable agent? If such was the case, the accused is entitled to an acquittal."

§ 576. Chief Justice Gibson, of the supreme court of Pennsylvania, sitting in 1846 with two of his associates in a court of oyer and terminer, after repudiating the doctrine that partial insanity excuses anything but its direct results, and sliding, in reference to such cases, into the "right and wrong" test, pro-



ceeded to charge the jury as follows : " But there is a *moral or homicidal* insanity, consisting of an irresistible inclination to kill or to commit some other particular offence.<sup>1</sup> There may be an unseen ligament pressing on the mind, drawing it to *consequences which he sees but cannot avoid*, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual ; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, *though aware of the heinous nature of the act*. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature."<sup>2</sup>

§ 577. In a still earlier case in Pennsylvania, Judge Lewis — then presiding in Lycoming County, and afterwards chief justice of Pennsylvania, a judge from whom the subject of medical jurisprudence received peculiar and careful attention — recognized the same doctrine. " Moral insanity," i. e. " irresistible impulse," and not the " moral insanity " hereafter defined, " arises from the existence of some of the natural propensities in such violence, that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist in an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is therefore to be received with the utmost scrutiny. It is not generally admitted

<sup>1</sup> The charge was oral, having been reported by the present writer, and but hastily revised by the judge himself, which may account for the want of literal exactness in this and other expressions. The term " moral insanity," was used in the charge not in its technical sense, but as simply a popular term convertible with " irresistible impulse."

<sup>2</sup> *Com. v. Mosler*, 4 Barr, 266.

in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought never to be admitted as a defence, until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield. Where its existence is fully established, this species of insanity relieves from accountability to human laws. But this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptoms indicating its approach.”<sup>1</sup>

§ 578. In 1862, the text with the cases given in it was cited with approval by the supreme court of Kentucky; and while irresistible impulse, as a distinct line of defence, was recognized, it was held that to sustain it, “it must be known to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings.”<sup>2</sup>

§ 579. To the same effect is the judgment of the court of common pleas of Philadelphia, in 1868,<sup>3</sup> of the supreme courts of Indiana, in 1869,<sup>4</sup> of Iowa, in 1868,<sup>5</sup> of Illinois, in 1866,<sup>6</sup> and of the supreme court of the United States in 1872.<sup>7</sup> The doctrine, however, was emphatically repudiated in North Carolina, in 1861.<sup>8</sup>

§ 580. In conformity with this result may be cited a case in which Judge Story decided that a young woman, who in a violent impulse in puerperal fever threw her child overboard, though at the time perfectly conscious of the enormity of the act, was entitled to an acquittal.<sup>9</sup>

§ 581. In the enunciation of this doctrine there should be the strictest caution, and in the application of it the most jealous scrutiny. And in connection with it, it is always important to keep in mind the impressive language of Lord Brougham, when

<sup>1</sup> The same view was, some years after, repeated by the same judge. Lewis Cr. Law, 404; by Judge Edmunds (2 Am. Jour. of Ins.); Judge Whiting (Freeman's Trial—Pamph.); and by the supreme court of Georgia (Roberts v. State, 3 Georgia, 310).

<sup>2</sup> Scott v. Com. 4 Metcalf, 227. See also Smith v. Com. 1 Duvall, 224; Hopps v. People, 31 Ill. 385.

<sup>3</sup> Com. v. Haskell, 2 Brewster, 491.

See also Com. v. Freeth, 5 Clark, Pa. L. R. 455.

<sup>4</sup> Stevens v. State, 31 Ind. 486.

<sup>5</sup> State v. Felter, 25 Iowa, 67.

<sup>6</sup> Hopps v. State, 31 Ill. 385.

<sup>7</sup> Mut. Ins. Co. v. Terry, 15 Wal. 580.

<sup>8</sup> State v. Brandon, 8 Jones, 463.

<sup>9</sup> U. S. v. Hewson, 7 Bost. Law Rep. 361.

discussing the question before the house of lords: "With respect to the point of a person being an accountable being, that was, an accountable being to the law of the land, a great confusion had pervaded the minds of some persons whom he was indisposed to call reasoners, who considered accountability in its moral sense as mixing itself up with the only kind of accountableness with which they, as human legislators, had to do, or of which they could take cognizance. He could conceive of the case of a human being of a weakly constituted mind, who might by long brooding over real or fancied wrongs work up so perverted a feeling of hatred against an individual that danger might occur. He might not be deluded as to the actual existence of injuries he had received, but he might grievously and grossly exaggerate them, and they might so operate upon a weakly framed mind and intellect as to produce crime. He could conceive that the Maker of that man, in his infinite mercy, having regard to the object of his creation, might deem him not an object for punishment. But that man was accountable to human tribunals in a totally different sense. Man punished crime for the purpose of practically deterring others from offending, by committing a repetition of the like act. It was in that sense only that he had anything to do with the doctrine of accountable and not accountable. He could conceive a person whom the Deity might not deem accountable, but who might be perfectly accountable to human laws."<sup>1</sup>

§ 582. The conclusion we must reach, therefore, is, that an irresistible homicidal impulse, in an insane person, is a good defence, though such insane person was able to distinguish between right and wrong. With a sane person, however, it is not a defence, as the law makes all sane persons responsible for their impulses.<sup>2</sup>

<sup>1</sup> Hans. Par. Deb. LXVII. 728. See however, as qualifying the view of the text, *State v. Spencer*, 1 Zabriske, 196.

<sup>2</sup> See, as substantiating this conclusion, *Flanagan v. People*, 52 N. Y. 467; *People v. McDonell*, 47 Cal. 134, and authorities cited under next section.

In *Blackburn v. State*, 23 Ohio

St. 165 (decided in 1872), the proper questions to be submitted to the jury were declared to be: "Was the accused a free agent in forming the purpose to kill? Was he at the time capable of judging whether *that act* was right or wrong? And did he know at the time that it was an offence against the laws of God and man?"

Mr. Stephen's testimony on this

## IV. "MORAL INSANITY" IS NO DEFENCE.

§ 583. "Moral insanity," in its distinctive technical sense, is a supposed insanity of the moral system coexisting with mental point before the Homicide Committee is as follows : —

"Sub-section (d) applies to a man prevented by disease affecting his mind 'from controlling his own conduct.' Now, that again is a case which it is said ought not to form part of the law, and I have often heard judges say that it is a monstrous thing for anybody to believe in what are called irresistible impulses, and that the doctors who give evidence upon these trials constantly put forward as irresistible an impulse which is not in fact resisted; and no doubt they do. I have had a great deal to do with cases of this kind. I had to try a case of that nature on the circuit last summer, and I have been counsel in them, and there is no doubt that doctors do come forward and make statements which seem to be extremely foolish on that subject. But it is not because a man makes a foolish statement on that subject that the law is to put itself in a false position. It seems to me that if the fact is, that there are diseases of such a nature that my arm may suddenly rise and plunge a knife into some person near me, just as mechanically as if I were in a convulsive fit, to treat me as a murderer for doing it would be monstrous. And it also appears to me that the question whether or no such diseases do actually exist is a question of fact which the law ought not to prejudice in any way whatever; and if it be the case that there are such diseases, if that is proved by people who are skilful in these matters, I cannot see why that should not be left to the jury as well as any other fact, it being always pointed out to the jury

by the presiding judge, that it is one thing not to resist an impulse and another thing to be under the prey of an irresistible impulse in consequence of disease. Suppose a person rendered irritable by toothache were to go and kill somebody, I should say that that was no excuse at all. In the same way, if an insane desire arose in a man's mind, as in Dove's case, to kill another person, which was to some extent nourished by his own wickedness, I should say I would hang that man without mercy if he gratified that insane wish; but I would hang him, not because I should disregard an uncontrollable impulse, but because I should not believe that that impulse was uncontrollable, and because he gave way to a thing which he ought to have controlled and could have controlled. I recollect very well that in that case Baron Bramwell, who tried it, put this question to one of the doctors who was giving evidence that Dove could not help what he did: 'Supposing a man had been standing by him with a loaded pistol in his hand when he was going to poison his wife, do you think that he would have done it then?' 'No, I do not.' 'Then he ought not to have done it under these circumstances.' But supposing that the doctor was able to prove by referring to other instances that he would have been utterly unable to control himself, and that if you had put a rope round his neck ready to hang him, still that poison would have gone into that cup, that would be a case of uncontrollable impulse."

"With regard," says Blackburn, J., in his evidence given in the same investigation, "to the words

sanity. It is therefore to be distinguished from "insane irresistible impulse," which has just been noticed, in two respects: 1.

'from knowing that it is morally wrong, or from controlling his own conduct,' these are the definitions that are put in, and those agree pretty nearly with what was said in Macnaghten's case, in their extra-judicial opinions, by the judges in the house of lords; but we cannot fail to see that there are cases where the person is clearly not responsible, and yet knew right from wrong. I can give you an instance which shows what I held deliberately; it was in the case of that woman whom I was speaking of, who was tried for wounding a girl with intent to murder. The facts were these: the woman had more than once been insane, the insanity being principally brought on by suckling her child too long; that was the cause that had produced it before; she was living with her husband, and had the charge of this girl, — a girl of about fifteen, an impotent girl, who lay in bed all day; she was very kind to her and treated her very well; they were miserably poor, and very much owing to that she continued to nurse her boy till he was nearly two years old, and suddenly, when in this state, she one morning, about eleven o'clock, went to the child, lying there in bed, aged fifteen, and deliberately cut her throat; then she went towards her own child, a girl of five or six years of age, of whom she was exceedingly fond, and the girl hearing a noise, looked up, and said, 'What are you doing?' 'I have killed Olivia and am going to kill you,' was the answer. The child, fortunately, instead of screaming, threw her arms round her mother's neck, and said, 'No, I know you would not hurt your darling little Mopsy.' The woman dropped the child, went down-stairs, and went into a neigh-

bor's house, told her what she had done; that she had killed Olivia, and was going to kill Mary, 'but when the darling threw its arms round my neck, I had not the heart to do it.' She clearly knew right from wrong, and knew the character of her act; for some little time after that she talked rationally enough, but before night she was sent to a lunatic asylum, raving mad, and, having recovered, she was brought to be tried before me at a subsequent assize. On the definition in Macnaghten's case, she did know right from wrong. She did not know the quality of her act, and was quite aware of what she had done; but I felt it impossible to say that she should be punished.

"If I had read the definition in Macnaghten's case, and said, 'Do you bring her within that?' the jury would have taken the bit in their own teeth, and said, 'Not guilty, on the ground of insanity.' I did not do that; I told them that there were exceptional cases, and on that the jury found her not guilty, on the ground of insanity, and I think rightly. On this definition I think you would be obliged to say that woman was guilty."

Mr. Russell Gurney: "There were delusions, were there not?" — Blackburn, J.: "No. There was the subsequent evidence that before night she was so mad that they had to send her to an asylum; but before the crime, and sometime afterwards, there was nothing whatever to show a delusion. But I fear a general rule of this sort, making it a question for the jury, whether the disease was the efficient cause of the act, would be leaving the thing at large; I have never been able to assign a definition satisfactory to

"Irresistible impulse" is only a valid defence when the party offering it is mentally deranged, while in "moral insanity," by

my own mind, and will not pretend to do so."

Bramwell, J., in the course of his examination before the same committee, said :—

"You ought to threaten every man sensible to the effect of a threat; and if this crazy fellow knows that what he thinks a virtuous and moral action is one which will cause him to be hung, I shall feel much more safety after having tried Fenians than I could otherwise feel. A similar reasoning seems to me to apply to subsection D, 'from controlling his conduct.' I think that is a great mistake. I have sent into the Home Office this note: 'I vehemently protest against D. What is the meaning of a man being prevented controlling his conduct? When he is prevented, it is because the preventing motives are strong enough. When he is not prevented, it is because they are not strong enough. The effect of this would be to lessen the preventing motives.'"

"A. wishes to commit a rape. Disease of mind weakens his power of acting on motives of chastity, religion, morality, goodness, &c., but fear of the law added to those motives makes him able to resist. The proposal is to take away one of his good motives. At least this should be qualified by saying 'from controlling his conduct by the ordinary motives of mankind.' Now, I should like to mention to the committee two things, if they would permit me. One is that this illustration of a rape is not an imaginative case, for I have positively tried a man who I am certain had a mania on the subject.

"I can tell the committee the case if they are curious to hear it. It occurred in Monmouthshire, where there

are a number of narrow valleys parallel to each other, with a considerable hill or mountain between them, and the people had occasion to go from one valley to the other; and this man was a most moral and religious collier; was deacon in his congregation, earned larger wages than anybody in the neighborhood, and had a first-rate character; but he had the infirmity of waiting on the top of these hills and knocking women down, and treating them with atrocious violence. There were nineteen indictments against him. I tried him on five, and on all he was convicted; the others would not come forward. So that this case of a rape is not an imaginary one. Then, as to men controlling their actions, I should like to tell the committee this case: I tried a man named Dove many years ago for murdering his wife; he called a number of witnesses for the purpose of proving that he could not control his actions; there was one of them who, to prove the state of this man's mind, proved that he had shot a cat in the presence of his wife, or something of that sort; and this man gravely said that he believed it was an uncontrollable impulse. I put this question to him (I did not let him see the difficulty it would land him in; I got his mind away from the particular answer that he had given): 'Now, suppose a policeman had been present when he shot that cat, do you think he would have been restrained,' and he said, 'Yes.' 'Well, then,' I said, 'according to your view, an uncontrollable impulse is an impulse acting upon a man when a policeman is not present.' It is obvious that what is called an uncontrollable impulse is one as to which the deterring or controlling mo-

its very terms, the patient is always mentally sane; and 2. "Irresistible impulse" is a special propensity impelling to a particular bad act, while in "moral insanity" he is impelled to all sorts of badness. It is enough for the present to say that, as is abundantly demonstrated elsewhere,<sup>1</sup> "moral insanity," as thus defined, is an exploded psychological fiction. That it is repudiated by the courts of England and of the United States there is an almost unbroken current of authority to show. Carefully and conscientiously has the defence, by a number of independent courts, been scanned; and in almost every instance the conclusion is that the theory on which it rests is hostile alike to the principles of law and the safety of society.<sup>2</sup>

tives are not strong enough; and this is a proposition in all cases to take away from a man, in a state of mind in which he is more likely to do mischief than anything else, a deterring motive."

The statement on this point of Cockburn, C. J., given in the Appendix to the Report of the Committee of the House of Commons on the Homicide Amendment Bill, is of peculiar importance. It should be remembered that in the United States the question comes as to us disembarassed by the rulings of the house of lords, which in England can only be modified by legislative authority:—

"As the law, as expounded by the judges in the house of lords, now stands, it is only when mental disease produces incapacity to distinguish between right and wrong, that immunity from the penal consequences of crime is admitted. The present bill introduces a new element, the absence of the power of self-control.

"I concur most cordially in the proposed alteration of the law, having been always strongly of opinion that, as the pathology of insanity abundantly establishes, *there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by*

*the force of irresistible impulse, the power of self-control, when destroyed or suspended by mental disease, becomes, I think, an essential element of responsibility.* But while it would be desirable to establish the law on this basis, it certainly is not desirable so to establish it as to homicide, while in the closely cognate case of the offence doing grievous bodily harm, a different law would obtain. For this strange anomaly would arise: if the grievous bodily harm ended in death, there would be one test of insanity as created by this bill; if it did not, there would be another and a different one as established by the general law. This comes from the law relating to homicide being dealt with by itself, instead of being treated as part of the entire department of the law to which it belongs." An error of punctuation probably exists in the passage in italics, which is here copied accurately from the printed report. The sense, however, is in accordance with the position in the text: *that the knowledge that an act is wrong does not prevent an irresistible impulse from being an offence, when the actor is at the time insane.*

<sup>1</sup> 1 W. & S. Med. J. (1873) § 531-537.

<sup>2</sup> R. v. Oxford, 9 C. & P. 533; R.

V. MENTAL DERANGEMENT, THOUGH NOT CONSTITUTING TOTAL INSANITY, MAY BE PUT IN EVIDENCE TO LOWER THE GRADE OF GUILT.

§ 584. The old common law doctrine in this respect is founded on the hypothesis that sanity and insanity are states as clearly and absolutely distinguishable as are coverture and non-coverture; and that men are either wholly sane, so as to be wholly responsible, or wholly insane, so as to be wholly irresponsible. This principle, however, is now abandoned as based on a psychological untruth. There are many degrees both of sanity and insanity; and the two states approach each other in imperceptible gradations, melting into each other, to adopt an illustration borrowed by Lord Penzance from Burke, as day melts into night. There may, therefore, be phases of mind which cannot be positively spoken of as either sane or insane. Are persons in one of these phases to be acquitted of crime? If so, they would constitute a

*v. Goode*, 7 Ad. & El. 536; *R. v. Barton*, 3 Cox C. C. 275; *R. v. Higginson*, 1 C. & K. 129; *R. v. Layton*, 4 Cox C. C. 149; *R. v. Hayne*, 1 F. & F. 666; *R. v. Townley*, 3 F. & F. 889.

Shortly after Townley's case, on a trial for murder, before Erle, J., the defence relied on evidence showing a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of delirium tremens, the prisoner, however, not having been laboring under the effects of such a fit at the time of the act, and the circumstances showing sense and deliberation, and a perfect understanding of the nature of the act: it was held, that the evidence was not sufficient to support the defence, as it rather tended to show wilful excesses and extreme folly than mental incapacity. *R. v. Leigh*, 4 F. & F. 915. And see *R. v. Southey*, 4 F. & F. 864; *R. v. Watson* (1872), reported in 1 W. & S. Med. Jur. (1873) § 160; *R. v. Edmunds*, *Ibid.*

As American authorities may be

cited the following: *Com. v. Rogers*, 7 Metc. 500; *Com. v. Heath*, 11 Gray, 303; *U. S. v. Holmes*, 1 Clifford, 198; *State v. Lawrence*, 57 Me. 574; *Freeman v. People*, 4 Denio, 10; *Shorter v. People*, 2 Comst. 199; *McFarland's case*, 8 Abbott Prac. Cas. N. S. 69; *State v. Spencer*, 1 Zabriskie, 196; *State v. Windsor*, 5 Harr. 512; *Vance v. Com.* 2 Va. Cases, 132; *State v. Brandon*, 8 Jones, 403; *State v. Gardiner*, Wright, 392; *U. S. v. Schultz*, 6 McLean, 121; *Farrer v. State*, 2 Ohio St. R. 54; *People v. Coffman*, 24 Cal. 230; *Choice v. State*, 31 Ga. 424; *Spann v. State*, 47 Ga. 553; *State v. Richards*, 39 Connect. 591; *Flanagan v. People*, 52 N. Y. 467; *People v. McDowell*, 47 Cal. 134. These cases, though in various terms, unite substantially in declaring, as the proposition is stated by a very able jurist, Thurman, J. (*Farrer v. State*, 2 Ohio St. 54), "that there is no authority for holding that mere moral insanity, as it is sometimes called, exonerates from responsibility."



class not only dangerous but uncontrollable; for they would not be sane enough to be convicted as felons, and yet would not be insane enough to be confined as lunatics. Are they to be convicted, when charged with offences involving malice and premeditation? At this justice would revolt, for at the time of the commission of the guilty act the defendant, as it could readily be shown, was not in a condition of mind coolly to premeditate, or accurately to contemplate, a malicious design. The only course under such circumstances is to find the defendant guilty of the offence in a diminished grade, when the law establishes such grade; or when it does not, to inflict on him modified punishment.<sup>1</sup> Nor is this view unknown to the law. Such considerations (*i. e.* those of the defendant's mental constitution) are invoked whenever we have to determine whether a party assailed acted *bonâ fide* when resorting to violent measures of self-defence. So do we gauge responsibility in cases of sleep-drunkenness; so do we estimate the conduct of persons when roused by any great political or religious excitement;<sup>2</sup> and so we hold in cases of intoxication, when called upon to measure deliberation and intent.<sup>3</sup> If, in cases where homicide has been committed during an excitement

<sup>1</sup> See 1 Wh. & St. Med. J. § 126, 181, 200. An illustration of this principle, as it obtains in the German law, is found in the trial of Kullman, at Berlin, in Oct. 1874. I quote the following from a cable dispatch of Oct. 29, 1874, appearing in the Boston papers of Oct. 31, 1874:—

BERLIN, Oct. 29.—The trial of Kullman was resumed this morning. Dr. Reinecke testified that he did not consider Kullman a religious or political fanatic, or that he possessed a natural predisposition to crime; neither was he a common murderer. His powers of comprehension of right or wrong are unimpaired, but on the other hand he inherited a deficiency of moral strength. His maternal grandfather committed suicide, his mother died derailed, and his father was an habitual drunkard. These facts Dr. Reinecke thinks are calculated to produce in Kullman a want of independence in

forming opinions, susceptibility to external impressions, coldness of heart, vanity, and a tendency to violence. He is, therefore, of opinion that although Kullman may be considered an accountable being, his nature, nevertheless, inherits a morbid disposition calculated to affect his free will. The president of the court summed up the medical testimony to the effect that at the time of the assassination, as well as at present, Kullman was accountable for his acts to but a limited degree.

Kullman was found guilty as charged in the indictment, and sentenced to fourteen years' imprisonment in the house of correction, and ten years' suspension of his civil rights and police surveillance.

<sup>2</sup> Supra, § 190; 1 W. & S. Med. J. § 181.

<sup>3</sup> See *Roberts v. People*, 19 Mich. 401; supra, § 190, 191; infra, § 589.

which the defendant's peculiar psychical state has abnormally protracted and intensified, a verdict of murder in the second degree, or of manslaughter, is given in accordance with these views, a result is reached which not only harmonizes with sound principle, but is far more consistent with the public idea of justice than would be a verdict either of not guilty, or of murder in the first degree.<sup>1</sup> Mr. Stephen lends his valuable authority to the same view. "Partial insanity," he says, "may be evidence *to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused.* A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have had no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding,"<sup>2</sup> or in case of the death of the party so wounded, the defendant might be found guilty of manslaughter.<sup>3</sup>

<sup>1</sup> See as illustrating this, McGregor's case, 23 Am. Jour. Ins. 549.

<sup>2</sup> Stephen's Cr. Law (1863), p. 92.

<sup>3</sup> In *Jones v. Com.* 75 Penn. St. 408, the defendant pleaded guilty to an indictment for murder. By an act of assembly of that state, it is the duty of the court, when a person is "convicted by confession of the crime of murder, to proceed by the examination of witnesses to determine the degree of the crime and to give sentence accordingly." This was done by the court of oyer and terminer for Luzerne County, before which the case was tried, and the court determined the degree to be murder in the first degree. A writ of error was taken to the supreme court, under act of February 15, 1870, which requires that court to examine the law and evidence in all cases in which there has been a conviction of murder in the first degree, and to reverse the judgment if the conviction cannot be sustained. The supreme court, having examined the evidence, reversed

the judgment. In delivering the opinion, Agnew, C. J., said: "Intoxication is no excuse for crime, yet when it so clouds the intellect as to deprive it of the power to think and weigh the nature of the act committed, it may prevent a conviction of murder in the first degree. The intent to take life with a full and conscious knowledge of the purpose to do so, is the distinguishing criterion of murder in the first degree, and this consciousness of the purpose of the heart is defined by the words deliberately and premeditatedly. Much has been said upon the meaning of these words, some of which may mislead if we do not consider well the cases in which it has been altered. . . . Another case often quoted and misapplied is that of Richard Smith, tried before President Rush in 1816. Smith had become intimate with the wife of Captain Carson, and had a difficulty with him in his own house. He returned with Mrs. Carson and went with her up into the parlor. Carson came up un-

## VI. BURDEN OF PROOF.

§ 585. This point is hereafter distinctively considered.<sup>1</sup>

armed, and ordered him to leave. Smith had armed himself, and held one hand under his surtout, and the other in his breast. Carson told Smith he had come to take peaceable possession of his own house, and the latter must go. Smith said to Mrs. Carson: 'Ann, shall I go?' She replied 'No.' Smith moved into the corner of the room, Carson following and telling him he must go, at the same time letting his arms fall by his side, and saying he had no weapon. Upon this Smith drew a pistol from under his surtout, and shot Carson through the head; threw down his pistol and ran downstairs. In this state of the facts Judge Rush, charging upon the subject of deliberation, said: 'The truth is, in the nature of the thing no time is fixed by law or can be fixed for the deliberation required to constitute the crime of murder.' Speaking then of premeditation he said: 'It is equally true both in fact and from experience that no time is too short for a wicked man to frame in his mind the scheme of murder, and to contrive the means of accomplishing it.' We cannot doubt the correctness of these remarks in the case in which they were made, but cases often arise where this suddenness of intent to take life, when imputed may do great injury. Hence it was said in Dunn's case, 8 P. F. Smith, 16: 'This expression (of Judge Rush) must be qualified lest it mislead. It is true that such is the swiftness of human thought, no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well

convinced upon the evidence, that there was time to deliberate and premeditate. The law regards and the jury must find the actual intent, that is to say the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, then there is time to deliberate and premeditate.' This was said in the case of a sudden affray, where the circumstances made it a serious question whether the act was premeditated or was the result of sudden and rash resentment.

"Thus we must perceive that at the bottom of all that has been said on the subject of murder in the first degree, is the frame of mind in which the deadly blow is given, that state of mind which enables the prisoner either to know and be fully conscious of his own purpose and act or not to know. Why is insanity a defence to homicide? Because it is a condition of the mind which renders it incapable of reasoning and judging correctly of its own impulses, and of determining whether the impulse should be followed or resisted. Intelligence is not the only criterion, for it often exists in the madman in a high degree, making him shrewd, watchful, and capable of determining his purpose, and selecting the means of its accomplishment. Want of intelligence, therefore,

<sup>1</sup> See *infra*, § 665.

## VII. DRUNKENNESS.

§ 586. On this topic it is sufficient to enumerate the points elsewhere established.<sup>1</sup>

is not the only defect to moderate the degree of offence; but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effects upon the subject, and the true responsibility of the actor: a power necessary to control the impulses of the mind, and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. When this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influences, it cannot be said truthfully that the mind is fully conscious of its own purposes and deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions often seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind. It becomes necessary therefore to inquire upon the evidence in this case, whether the prisoner was really able to deliberate and premeditate the homicide.

"Wm. S. Jones had been upon bad terms with his wife. She had become too intimate with another Jones called Charley. Wm. S. Jones failing to break off the association, got to drinking hard, and finally after another

quarrel with his wife, on the 10th of June, 1871, attempted suicide after taking a large quantity of laudanum. Dr. Davis found him lying on a lounge partly insensible, eyes nearly closed, pupils contracted, and face discolored by congestion. Energetic remedies were used, and he was so far restored as to be out of danger, but the effects of the laudanum remained. From this time until the night of 19th of June, when he took the life of Mrs. Hughes, his mother-in-law, he was in a constant state of nervous excitement, continued drinking, and had bottles of laudanum about his person. Many witnesses describe him as without sense, constantly talking nonsense, wild in appearance, and incoherent in speech. Some say he acted like a man drinking hard, was intoxicated, and once fell from his house. Others described him as looking crazy, talking to himself, his hands going, his head thrown back, walking to and fro, throwing his head about, moving his arms, and wild, nervous, and excited. He would jump upon a chair and begin to preach, and run off upon Charley Jones and his wife. Said he was going to build a tavern on the mountains and a church beside it; claimed all the property about, and was evidently much out of the way. These appearances were particularly noticed on the 19th day of June, the day of the homicide. He was then on very bad terms with his wife, yet seeking her, and remonstrating with her, and on the afternoon of that day he had beaten and abused her; chasing her down-stairs and into the street, and then striking and kicking her, until separated by others.

<sup>1</sup> Whart. Cr. L. 7th ed. § 32 *et seq.*

§ 587. *a. Settled insanity, produced by intoxication, affects the responsibility in the same way as insanity produced by any other cause.*

§ 588. *b. Temporary insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated.*

§ 589. *c. While intoxication per se is no defence to the fact of guilt, yet when the question of intent or premeditation is concerned, evidence of it is material for the purpose of determining the precise degree.<sup>1</sup>*

He continued in this condition down into the night of the 19th, when he came to Mrs. Hughes's house between nine and ten o'clock. Stepping inside the door, he asked Mrs. Hughes if the fuss was settled; said he had come down to settle it. She rose and told him to go away; told Lizzie to fetch a poker; said she would strike him if he did not go away. He stepped back, she picked up a stool and told him if he did not go away she would level him with it. He said: 'I'll leave you now,' pulled out a pistol, stepped forward, and shot her. Mrs. Hughes twice exclaimed: 'I am shot,' and went back into the kitchen, while Jones was seized by the persons present, and the pistol was wrested from his hand. Between him and Mrs. Hughes there had been a state of good feeling before he took the laudanum, and she attended him upon the day when he was under its influence. He spoke of her as his best friend. His conduct toward his wife, her daughter, had led Mrs. Hughes to resent it, and some feeling had arisen on the part of Jones; but after his arrest he said he took the pistol to kill his wife, and the old woman had got it. Looking then at the state of Jones's mind from the 10th until the 19th of June, and down to the very moment he fired the pistol, and also at the suddenness of his quarrel with Mrs. Hughes, her call for the poker, and lifting the stool, it

seems to us a matter of grave doubt, whether his frame of mind was such that he was capable either of deliberation or premeditation. It appears to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a distorted mind, led away from reason and judgment by dwelling upon the conduct of his wife, influenced by his continued state of excitement. It presents the case of the preparation of a weapon and an undefined purpose of violence to some one, where the time for reflection was ample, but where the frame of mind was wanting which would enable the prisoner to be fully conscious of his purpose, or to resolve to take the life of the deceased with deliberation and premeditation. Yet it was clearly murder, done without sufficient provocation and without necessity, and in a frame of mind evincing recklessness, and that common law malice which distinguishes murder from manslaughter. There was error, therefore, in ascertaining the degree and sentencing to death. The judgment of the court of oyer and terminer of Luzerne County is reversed."

<sup>1</sup> See authorities cited in Whart. Cr. L. 7th ed. § 35 *et seq.*, and see also Jones v. Com., *supra*, § 584; Malone v. State, 49 Ga. 210; Cluck v. State, 40 Ind. 263; People v. Williams, 43 Cal. 344.

## CHAPTER XVII.

### CHARACTER OF DEFENDANT.

#### I. DEFENDANT'S GOOD CHARACTER AS A DEFENCE, § 592.

Defendant may show a character inconsistent with the crime charged, § 592.

Test is general reputation, § 593.

Prosecution cannot rebut by particular facts, § 594.

No presumption to be drawn from non-production of such evidence, § 595.

Prosecution cannot rebut by showing

bad character subsequent to homicide, or in localities where defendant had not lived, § 596.

Prosecution cannot impeach unless defendant puts in issue, § 597.

#### II. DEFENDANT'S PRIOR MISCONDUCT IN PROVING MALICE OR GUILTY KNOWLEDGE, § 598.

Admissible for the prosecution for such purposes, § 598.

#### I. DEFENDANT'S GOOD CHARACTER AS A GENERAL DEFENCE.

§ 592. *Defendant may show a character inconsistent with the crime charged.*—As is elsewhere fully shown, the defendant will, in all criminal prosecutions, be allowed to call witnesses to speak generally as to his character, but not to give evidence of particular acts, unless such evidence tends directly to the disproof of some of the facts put in issue by the pleadings.<sup>1</sup> In each case the character sought to be proved must not be general, but such as would make it unlikely that the defendant would be guilty of the particular crime with which he is charged.<sup>2</sup> Hence evidence in a homicide case that the defendant when in the army was re-

<sup>1</sup> Whart. Cr. Law 7th ed. § 636; Archb. C. P. 104; 2 Russ. on Cr. 784; R. v. Stannard, 7 C. & P. 673; Com. v. Hardy, 2 Mass. 317; State v. Wells, Cox. R. 424; Com. v. Webster, 5 Cush. 324; Davis v. State, 10 Geor. 101; Hopps v. People, 31 Ill. 385. See this subject discussed, Whart. Cr. L. 7th ed. § 824.

<sup>2</sup> 2 Russ. Cr. & M. 784; 1 Greenl. on Evid. § 54; R. v. Clarke, 2 Stark. 241; R. v. Hodgson, R. & R. 211; State v. Dalton, 27 Missouri (6 Jones), 12; Douglas v. Towsey, 2 Wend. 352. It has been held not to

be error to reject an offer to prove that the prisoner "always had been known as a kind hearted man," if the rejection be accompanied by permission to show his character for peacefulness, &c., toward the deceased, or in any other matter bearing on the prosecution. Cathcart v. Com. 1 Wright (Penn.), 108. In Com. v. Twitchell, 1 Brewster, 563, while the defendant's general character for peace was held admissible, he was not allowed to put in evidence of his "mild and pacific habits."

puted a good and valiant soldier is inadmissible.<sup>1</sup> The immediate object for which such evidence is introduced is to disprove guilt, but it has been properly said in Tennessee that evidence of the pacific character of the defendant is admissible on a trial for murder, to aid the jury in ascertaining the probable grade of the offence.<sup>2</sup>

§ 593. *Test is general reputation.*—The proper question is, not “personal knowledge” by the witness, but the defendant’s “general reputation.”<sup>3</sup>

§ 594. *Prosecution cannot rebut by particular facts.*—Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced in rebuttal, it has been said the examination may be extended to particular facts;<sup>4</sup> though this has properly been denied by courts of high respectability,<sup>5</sup> and viewing the question in regard to principle, we must hold it to be oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal a series of independent facts, forming each a constituent offence.<sup>6</sup> Rebutting evidence of general reputation for bad character is, however, always admissible.

§ 595. *No presumption to be drawn from non-production of such evidence.*—If a person on trial for an alleged offence offer no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offence charged, or that his character is bad.<sup>7</sup>

§ 596. *Prosecution cannot rebut by showing bad character after the homicide; or in localities where defendant had not lived.*—When the defendant introduces evidence for the purpose of proving his general good character previous to the date of the trans-

<sup>1</sup> *People v. Garbutt*, 17 Mich. 9.

<sup>2</sup> *Carroll v. State*, 3 Humph. 315. See also *People v. Stewart*, 28 Cal. 395; *People v. Gleason*, 1 Nev. 173.

<sup>3</sup> *R. v. Rowton*, Leigh & C. 520; 10 Cox C. C. 25, and cases cited supra.

<sup>4</sup> *Com. v. Robinson*, Thach. Cr. Cas. 230; *State v. Jerome*, 33 Conn. 265.

<sup>5</sup> *Com. v. Beale*, Phila. 1854, Thompson, P. J.; *Keener v. State*, 18 Geor. 194; *R. v. Rowton*, L. & C. 520; 10 Cox C. C. 25; Leigh & C. 520; *McCarty v. People*, 51 Ill. 281.

<sup>6</sup> *Com. v. Webster*, 5 Cush. 314; *People v. White*, 14 Wend. 111; *Bennett v. State*, 8 Humphreys, 118; *Com. v. Sackett*, 22 Pickering, 394; *contra*, *R. v. Burt*, 5 Cox C. C. 284, overruled by *R. v. Rowton*, Leigh & C. 520; 10 Cox C. C. 25.

<sup>7</sup> *State v. Upham*, 38 Maine, 261; *State v. Tozier*, 49 Maine, 404; *Ackley v. People*, 9 Barb. S. C. 609; *People v. Bodine*, 1 Denio, 281; *State v. O’Neal*, 7 Iredell, 254; *Donaghoe v. People*, 6 Parker C. R. 120; though see *State v. McAllister*, 11 Shep. 139.

action charged against him, this cannot be rebutted by evidence of bad character after the homicide ;<sup>1</sup> and in one case the prosecutor was not allowed to inquire of the witness what he had learned of the character of the prisoner previous to the date of the transactions, by conversation had since the said date with persons acquainted with the prisoner ;<sup>2</sup> though the general question was once ruled otherwise in Massachusetts.<sup>3</sup> So the prosecution cannot rebut such general evidence by showing that in *particular localities* the defendant's character was bad, he never having *lived* in such places.<sup>4</sup>

§ 597. *Prosecution cannot impeach unless defendant puts in issue.* — Unless, however, the defendant puts his character in issue, the prosecution cannot call witnesses to impeach it ;<sup>5</sup> and where the defendant, in part of a confession, said he was an old convict, the court held that part of the confession inadmissible, he not having put his character in issue.<sup>6</sup>

Upon an indictment for assaulting a peace officer in the execution of his duty, where the assault was committed by the prisoner in resisting his arrest by the officer on a charge of felony, the officer cannot, upon his examination in chief, be questioned as to his knowledge of the prisoner's character for the purpose of showing that he had reasonable cause to suspect the prisoner of having committed the felony for which he was arrested. The proper course under such circumstances is to ask the officer generally whether he had reason to suspect the prisoner, leaving the prisoner's counsel to inquire into the grounds of suspicion, if he thinks fit to do so.<sup>7</sup>

<sup>1</sup> *State v. Johnson*, Winston N. C. 152; *Wroe v. State*, 20 Ohio St. 460; 1 Phil. Ev. c. 7, § 7.

<sup>2</sup> *Carter v. Com.* 2 Virg. C. 169.

<sup>3</sup> *Com. v. Sacket*, 22 Pick. 394.

<sup>4</sup> *Griffin v. State*, 14 Ohio St. R. 55.

<sup>5</sup> *State v. O'Neal*, 7 Iredell, 251; *Dewitt v. Greenfield*, 4 Ohio, 227; *Com. v. Hopkins*, 2 Dana, 418; *Fanning v. State*, 14 Mo. 386; *Bull. N. P.*

296; *Com. v. Webster*, 5 Cush. 325; *Carter v. Com.* 2 Virg. Ca. 169; *Griffin v. State*, 14 Ohio St. R. 55; *State v. Creson*, 38 Missouri, 372; *Young v. Com.* 6 Bush (Ky.), 312.

<sup>6</sup> *People v. White*, 14 Wend. 111.

<sup>7</sup> *R. v. Tuberfield*, L. & C. 495; 10 Cox C. C. 1.



## II. DEFENDANT'S PRIOR MISCONDUCT AS PART OF THE CASE OF THE PROSECUTION TO PROVE MALICE OR GUILTY KNOWLEDGE.

§ 598. *Prior misconduct admissible when proving malice or scienter.* — While, however, bad character cannot be put in issue by the prosecution, it is permitted, as is elsewhere seen,<sup>1</sup> to introduce evidence of prior misconduct, where it is relevant either to (1) prior malice towards an individual, or (2) guilty knowledge. Thus it has been already noticed that on the trial of a man charged with the murder of his wife, the state can show that he had lived in adultery with another woman, as well as other acts of maltreatment.<sup>2</sup> So evidence of prior attempts at administering a particular poison is admissible to disprove the defence that the poison, in the case under trial, was given in ignorance or mistake.<sup>3</sup>

§ 599. It is here, however, that a fundamental distinction begins, for while particular acts may be proved to show malice or *scienter*, it is inadmissible to prove, either in this or any other way, that the defendant had a *tendency* to the crime charged.<sup>4</sup> Hence, it has been correctly held that on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits in punishing other slaves is not admissible for the prosecution.<sup>5</sup> For it would be in entire variance with the usual view of the common law, if a man's having been guilty of other offences, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge.<sup>6</sup>

§ 600. On the trial of Mrs. Fair in California, in 1872, for the murder of Crittenden,<sup>7</sup> the evidence being that the defendant claimed to have been the mistress of the deceased, the defendant's counsel offered evidence to show that the defendant's pros-

<sup>1</sup> See *infra*, § 696.

<sup>2</sup> Whart. Cr. L. 7th ed. § 633; *State v. Watkins*, 9 Conn. 47; *Johnson v. State*, 17 Ala. 618; *People v. Stout*, 4 Parker C. C. 71, 132. See also *State v. Rash*, 12 Ired. 382; *State v. Wisdom*, 8 Porter, 511; *Cole v. Com.* 2 Grat. 696.

<sup>3</sup> See *infra*, § 727.

<sup>4</sup> *Albright v. State*, 6 Wisc. 74; *People v. Jones*, 31 Cal. 565; 1 Phil-

lips Evid. 499; *R. v. Oddy*, 5 Cox C. C. 210; 2 Denison C. C. 264; *R. v. Cole*, 1 R. C. & M. 939; 1 Russ. on Crimes, 700.

<sup>5</sup> *Dowling v. State*, 5 Smedes & Marsh. 664.

<sup>6</sup> See *State v. Renton*, 15 New Hamp. 169.

<sup>7</sup> *People v. Fair*, 43 Cal. 137; 1 Green C. R. 217.

pects had been ruined by the conduct of the deceased. The prosecution then offered to prove the previous bad character of the defendant for chastity. This evidence was admitted by the court trying the case, but this admission was held error by the supreme court. "The defence relied on in this cause," said Crockett, J., "is, that at the moment when the fatal shot was fired the accused was laboring under a temporary insanity, proceeding from certain physical causes, aggravated by the extraordinary mental excitement occasioned by the circumstances which immediately preceded the killing. The proof of the defendant's bad reputation for chastity was offered and submitted, solely on the ground that it tended to rebut the inference that the alleged mental excitement of the defendant was occasioned by a sense of shame and mortification which she experienced on account of the damage which she supposed her reputation had suffered by reason of her connection with Crittenden. The proof was, therefore, admitted for the purpose of throwing some light on the question of her mental condition at the moment when the deed was committed. If the defendant had offered any proof whatever that, previous to her relation with Crittenden, her reputation for chastity was good, and that the damage to that reputation which ensued from her connection with Crittenden so preyed upon her mind, in her then state of physical debility, as to result in a state of temporary insanity, it would have been clearly competent for the prosecution to rebut this presumption by proof that she had no reputation to lose, and consequently that she could not have experienced any great mental excitement occasioned by the loss of a reputation which she did not possess. But the defendant offered no proof whatever as to her previous reputation; and even in her own account of the transaction, and of the state of her mind at the time, did not attribute her alleged temporary insanity to any mental excitement resulting from a supposed loss of her reputation. On the contrary, she attributes it partly to her physical condition and partly to the excitement produced by a fear that she was about to lose, or was in danger of losing, the affections of Mr. Crittenden, to which, it appears, she claimed to have a better right than his lawful wife. In the absence of all proof on her part tending to show that her alleged mental aberration was in any degree produced by a sense of shame or mortification occasioned by any damage

to her good name, it was not competent for the prosecution to prove that her reputation for chastity was bad. She had offered no proof tending to show that it was good, and she did not pretend, in her version of the transaction, that her alleged insanity resulted in any degree from the loss of a previously good reputation. I am therefore of opinion that the proof offered by the prosecution on this point was improperly admitted, inasmuch as it did not tend to rebut any proof offered by the defence, nor to elucidate the causes to which she attributes her alleged insanity. I have deemed it proper to add my views on this branch of the case to those of Mr. Justice Wallace, not because I dissent from any proposition stated by him, but for the reason that it has been insisted with much earnestness by the counsel for the prosecution that the proof of reputation in this case does not fall within the general rule which allows the reputation of the accused to be assailed only in rebuttal of proof of a good reputation offered by the defendant."

## CHAPTER XVIII.

### DECLARATIONS OF THIRD PARTIES.

§ 603. *Declarations of third parties generally inadmissible.* — Declarations by third persons, in reference to the offence with which the defendant is charged, are hearsay, and consequently inadmissible in evidence.<sup>1</sup> Hence, on an indictment for murder, the admissions of other persons that they killed the deceased are not evidence; <sup>2</sup> and evidence of threats by other persons are inadmissible.<sup>3</sup> And so of declarations of the deceased before his death, that he was about to disappear.<sup>4</sup> But if such third persons, on being examined as witnesses, had implicated the prisoner by their testimony, evidence of their declarations that they were guilty of the offence is admissible to discredit them.<sup>5</sup>

In conformity with this rule, where, on trial of an indictment for murder, a witness for the prosecution testified that she had seen the two defendants come from a room where the dead body was found, under suspicious circumstances, it was held that the prosecution could not show by other witnesses, that she at once, while giving the alarm, gave the names of the two persons thus seen.<sup>6</sup> And with this accords the well known position that a witness cannot in general be corroborated by proof of prior statements made by him to others.<sup>7</sup>

<sup>1</sup> *Bergen v. People*, 17 Ill. 426; *State v. Reidel*, 26 Iowa, 430; *Cheek v. State*, 35 Ind. 492; *State v. Vincent*, 24 Iowa, 570.

<sup>2</sup> *State v. Duncan*, 6 Iredell, 236; *Smith v. State*, 9 Ala. 990.

<sup>3</sup> *State v. Duncan*, 6 Iredell, 236.

<sup>4</sup> *State v. Vincent*, 24 Iowa, 570.

<sup>5</sup> *Smith v. State*, 9 Ala. 990.

<sup>6</sup> *Com. v. James*, 99 Mass. 438.

<sup>7</sup> *Whart. C. L.* 7th ed. § 820.

## CHAPTER XIX.

### CHARACTER OF DECEASED.

As a general rule, irrelevant to prove deceased's bad character, § 605.

But in cases of self-defence relevant to prove deceased's ferocity, strength, and vindictiveness, in order to show *bona fides* of defendant's belief that he was in extreme danger, § 606.

England, § 607.

New York, § 608.

New Jersey, § 609.

Pennsylvania, § 610.

North Carolina, § 612.

South Carolina, § 613.

Georgia, § 614.

Alabama, § 615.

Tennessee, § 618.

Mississippi, § 619.

Indiana, § 620.

Michigan, § 621.

Minnesota, § 622.

Iowa, § 623.

Missouri and California, § 623 a.

Inconclusiveness of the cases cited to the contrary, § 624.

In Massachusetts such evidence is held inadmissible, § 625.

§ 605. *As a general rule, irrelevant to prove the deceased's bad character.* — Supposing that A. is charged with killing B., it is no defence for A to say, "I killed him because he was a bad man." Hence when the defendant offers to prove, as a defence, that the deceased was a man of ferocious character, or an assassin, or a highway robber, or garroter, this, by itself, is irrelevant. If the deceased's character was thus infamous and desperate, and the defendant had reason to fear violence from him, then the defendant's remedy was to apply to the law for protection. For him to take the law in his own hands and kill the deceased is murder; and hence, as it is no defence for him, when the case against him is one of deliberate killing not in self-defence, that the deceased was a bad man, evidence of such badness is irrelevant if offered by him on the trial.<sup>1</sup>

<sup>1</sup> State v. Field, 14 Maine Rep. 248; Harring. 562; State v. Jackson, 17 Com. v. Ferrigan, 44 Pa. St. 386; Wise Mo. (2 Bennett) 544; State v. Brien, v. State, 2 Kansas, 419; Com. v. York, 10 La. Ann. R. 453; People v. Murray, 9 Metcalf, 110; Wesley v. State, 37 Missis. 327; Com. v. Wilson, 1 Gray La. Ann. Rep. 679; Shorter v. People, R. 337; Com. v. Hilliard, 2 Gray, 294; 2 Comstock, 197; S. C. 4 Barbour, Com. v. Mead, 12 Gray, 168; Haynes 460; Campbell v. People, 16 Illinois, v. State, 17 Geo. 465; State v. Tilly, 17; Henderson v. State, 12 Texas, 525; Dock v. Com. 21 Grat. 909; Egler v. People, 3 N. Y. Supreme Court,

See Post  
by leaf.

§ 606. *But where the defendant sets up self-defence, and proceeds to present a case of apparent danger honestly believed in by himself as a defence, then evidence of the deceased's ferocity, strength, brutality, and vindictiveness is relevant to show the bona fides of the defendant's belief.*— This principle is a necessary consequence of the position already stated, that, on the issue of self-defence, a danger which is apparently imminent is to be viewed, provided the person assailed honestly believe in its reality and imminency, as if it were actually real and imminent. It makes no difference, so far as concerns the question immediately before us, whether we assume, as do some of the authorities, that the danger must have been apparent to "reasonable men," or whether we hold it must have been apparent to the defendant himself. Either way, the conclusion reached at the time of the conflict, as to the "apparency" of the danger, must be greatly affected by the assailant's character for ferocity, brutality, and vindictiveness, as well as by his special animosity to the assailed. There can be no question in such a case, about the right to prove that the deceased was armed with gun or sword; why not that he was armed with enormous bodily strength and desperate rage? Specific threats to the defendant can be put in evidence; why not a general ferocity of temper which vents itself on all by whom it is crossed, and which spares not life in its fury? Suppose a Thug should infest a community, and that the defendant should discover such an assailant in his chamber, would it be inadmissible, on the plea of *se defendendo*, to prove that he was a Thug? The great point to be made out on the plea of *self-defence* is, that the defendant was pushed to the wall, or that he could only protect himself, his family, or his house, from felony, by taking the assailant's life. And the necessity of such extreme action can only be shown by proving that the assailant was so armed, and was guided by such violent purposes, as to make other and milder means of defence inadequate. The law excuses on this ground a homicide of one entering a house in the night-time, far more readily than that of one entering in the day, because, it says, "entering a house in the night-time is a presumption of a felonious intent." So, to prove this felonious intent, specific acts of guilt, pointing in the same direction, and prior attempts may un-

796. So the state cannot prove par- constituting general bad character.  
ticular acts of violence of deceased as Pound v. State, 43 Ga. 88.

der certain conditions be proved. The general principle, then, is this: not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, for it is as much murder in such manner to kill the most desperate of men as to kill the most inoffensive; but that, whenever it is shown that a person honestly and non-negligently believes himself attacked, it is admissible for him to put in evidence whatever could show the *bona fides* of his belief. He may thus prove that the person assailing him had with him burglars' instruments; or was armed with deadly weapons; or had been lurking in the neighborhood, on other plans of violence. He is entitled to reason with himself in this way: "This man comes to my house masked, or with his face blacked; he is the same who has been prowling about my house, and is connected with other felonious plans; I have grounds to conclude that such is his object now." And if so, he is also entitled to say: "This man now attacking me is a notorious ruffian; he has no peaceable business with me; his character and relations forbid any other conclusion than that his present attack is felonious." And if he has thus reason to expect, and defend himself against, a desperate conflict, the facts are such as he is entitled to avail himself of on trial. He must first prove that he was attacked; and this ground being laid, it is legitimate for him to put in evidence whatever would show he had ground to believe such attack to be felonious.<sup>1</sup>

§ 607. In *England* we have no authority direct to this particular point. Intimations, however, from eminent judges, would lead us to believe that evidence of the deceased's ferocity and vindictiveness would not be refused where there is a *prima facie*

<sup>1</sup> Whart. C. L. 7th ed. § 641; Pritchett v. State, 22 Alab. 39; Quesonberry v. State, 3 Stew. & P. 315; State v. Tackett, 1 Hawks, 210; Wright v. State, 9 Yerger, 342; Hinch v. State, 25 Ga. 699; Dupree v. State, 33 Ala. 380; State v. Hicks, 6 Jones (27 Mo.), 588; Payne v. Com. 1 Metcalf (Ky.), 370; De Forest v. State, 21 Ind. 23; State v. Smith, 12 Rich. S. C. 430; Rippey v. State, 2 Head, 217; Franklin v. State, 29 Ala. 14; Cotton v. State, 31 Miss. 504; Chase v. State, 46 Missis. 705; Harman v. State, 3 Head, 243;

Wise v. State, 2 Kansas, 419; Fahnestock v. State, 23 Ind. 231; Pfomer v. People, 4 Parker C. R. 558; Com. v. Seibert, *infra*, § 610; Pridgen v. State, 31 Tex. 420; Patterson v. People, 46 Barbour, 625; Pond v. People, 8 Mich. 150; State v. Neeley, 20 Iowa, 108; Dorsey v. State, 34 Texas, 651; Monroe v. State, 5 Ga. 85; State v. Keene, 50 Mo. 359; State v. Dumphrey, 4 Minn. 438; People v. Murray, 10 Cal. 309; People v. Edwards, 41 Cal. 640.

case of self-defence laid by the defendant. Thus in a capital case, Garrow, B., told a jury : " But here the life of the prisoner was threatened, and if *he considered his life in actual danger*, he was justified in shooting the deceased as he had done ; but if, *not considering* his own life in danger, he rashly shot this man who was only a trespasser, he would be guilty of manslaughter." <sup>1</sup> And Lord Tenterden, also in a capital case, told the jury to " take into consideration the previous habits and connection of the deceased and the prisoner, with respect to each other." <sup>2</sup> Mr. Starkie lays down premises from which the same conclusion may be legitimately drawn : " On a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independent of any intention to injure another, or even of carelessness or negligence ; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance-medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and *their own judgment and experience, as applied to all the circumstances and evidence.*" <sup>3</sup>

§ 608. In *New York*, in trials before Judge Platt <sup>4</sup> and Judge Van Ness, <sup>5</sup> evidence of the vindictive temper of the deceased was held admissible. In 1866 the question was brought before the court of appeals in a case where the point was elaborately and ably argued. <sup>6</sup> The result reached was that though evidence of the defendant's ferocity and vindictiveness would be admissible when a case of self-defence was laid, it was inadmissible without such a prerequisite. The law was thus correctly laid down by Davies, C. J. : —

" The testimony could, therefore, have been properly excluded on the ground of its irrelevancy, and I cannot see that it was admissible upon any principle, upon the facts proven in this trial. The defence set up must be such as the facts developed will sustain, and if no assault upon the prisoner has been committed or threatened, then the defendant's counsel concedes the evidence of

<sup>1</sup> *R. v. Scully*, 1 Car. & Pay. 319.

<sup>4</sup> *People v. Blake*, 1 City Hall Rec.

<sup>2</sup> *R. v. Lynch*, 5 C. & P. 324. See 100.

also *R. v. Fisher*, 8 C. & P. 182.

<sup>5</sup> *People v. Smith*, 2 City Hall Rec. 77, 81.

<sup>3</sup> 1 Stark. Ev. 66.

<sup>6</sup> *People v. Lamb*, 2 Keyes, 364.



character of the deceased is inadmissible. It must be an assault committed or threatened at the time of the homicide, or so immediately preceding it, or so intimately connected with it, as to justify the taking of life in self-defence, or to ward off great, impending, and imminent danger of bodily harm. It is unnecessary to recapitulate the evidence to show that no such state of circumstances existed here. That these views are abundantly sustained by text writers and authority, a reference to some of them will satisfactorily appear. Wharton, in his American Criminal Law, § 641, thus lays down the doctrine: 'On the trial of an indictment for homicide, evidence to prove that the deceased was well known, and understood generally by the accused and others to be a quarrelsome, riotous, and savage man, is inadmissible. In the eye of the law, to murder the vilest and most abject of the human race is as great a crime as to murder its greatest benefactor. In one or two cases, however, while the law as above laid down was distinctly recognized, it has been said, that where the killing has been under such circumstances as to create a doubt as to the character of the offence committed, the general character of the deceased may sometimes be drawn in evidence; but the rule undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*; for it would be a barbarous thing to allow A. to give as a reason for killing B., that B.'s disposition was savage and riotous.' And Wharton, in his American Law of Homicide, p. 249, says: 'It has already been briefly considered how far the character of the deceased for peace and order may be drawn into question, where the defence taken is that the defendant, from all the circumstances in the case, of which the deceased's character was one, had reason to be in fear of his life. As was then shown, there have been cases in which courts have been obliged to allow such evidence to be introduced, and it is easy to imagine cases in the future in which it would be impossible to exclude it; but, as a general principle, the rule continues unbroken, that evidence that the deceased was riotous, quarrelsome, and savage is inadmissible, even though such knowledge be brought home to the defendant himself; any other rule would allow a private citizen to take upon himself the province of government in the punishment of crime.' Thus it is seen that, as a general principle, such evidence is inadmissible. *When admissible, it must be in a*

*case where the defendant had reason to be in fear of his life, or had reasonable ground to apprehend great bodily harm."*

In a case which came before the court of appeals in 1874,<sup>1</sup> the reporter tells us that "after general evidence had been given on behalf of the prisoner tending to show that the deceased was disposed to be sullen and violent in temper when angry, and that when excited she was ungovernable and passionate; questions were then asked tending to show particular instances of exhibitions of temper. These were excluded under objection. The ruling was affirmed in the court of appeals." No reasons, however, were given.

§ 609. In *New Jersey*, evidence of hostile and vindictive temper on part of the deceased was received in an early case,<sup>2</sup> Kirkpatrick, C. J. saying: "Inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, *every circumstance which goes to show the feelings of the parties towards each other* may be proper. That temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and, therefore, it may be received by the jury, to show the state of mind of the parties."

§ 610. In *Pennsylvania*, though the question has never been precisely determined by the supreme court, the practice has always been to admit evidence of any facts or circumstances likely to show the condition of the defendant's mind on the necessity of self-defence. This was done by a very able jurist, Judge King, on the trial of the Kensington and Southwark rioters in 1844-45; though he at the same time correctly ruled that if the defendant *negligently* reached honest though erroneous conclusions as to the reality of the danger to which he was exposed, this, though it lowered the grade of the homicide, did not justify an acquittal.

So Judge Conyngham, in a celebrated case already cited, admitted, for the purpose of showing the honesty of the defendant's belief of impending danger, evidence of the ferocity and brutality of the deceased.<sup>3</sup> And that evidence of the apparent imminency of the danger is admissible, whenever there is a *prima facie* case of self-defence, is logically deducible from the position rightly as-

<sup>1</sup> Egger v. State, 56 N. Y. 642.

<sup>2</sup> Com. v. Seibert, *supra*, § 506-8.

<sup>3</sup> State v. Zellers, 2 Halst. 230.

sumed by the courts of this state, that the defendant is to be judged by his own lights.<sup>1</sup>

§ 611. It is true that subsequently the supreme court of the state<sup>2</sup> held that it was inadmissible for a defendant to prove generally the deceased's bad character, as a defence to an indictment for murder. But in that case self-defence was not pretended; and when the issue is deliberate killing, not in self-defence, no one questions the position that the defendant cannot defend himself on the ground that the deceased was a reprobate, and deserved to be killed.

§ 612. *North Carolina* was one of the first states to lead off in affirming the admissibility of this kind of proof. The question originally arose on an indictment against a white man for the trial of a slave; and it was ruled that in such an issue, the defendant setting up self-defence could give in evidence that the deceased was turbulent and insolent to white persons.<sup>3</sup> Taylor, C. J., speaking for the supreme court, said: "It does not appear, from any direct proof in the case, what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The conclusion they might arrive at was all-important to the prisoner, since the degree of the homicide depended on it; and whether it was malicious, extenuated, or excusable must have been determined by them from such lights as they could gather from the facts actually proved, and such inferences as they might deduce from them. It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this inquiry, and according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. *If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels, and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under strong and legal provocation.* If, on the contrary, the behavior of the de-

<sup>1</sup> See cases cited *supra*, § 506-8.

<sup>2</sup> *State v. Tackett*, 1 Hawks, 210.

<sup>3</sup> *Com. v. Ferrigan*, 44 Penn. St. (8 Wright) 386.

ceased was usually 'mild and respectful towards white persons, nothing could be added by it to the force of the other circumstances. They must still depend upon their own weight, and the probability be lessened, that the prisoner had received a provocation sufficient in point of law to extenuate the homicide. The evidence, therefore, ought to have been received, and this will be the more apparent when the charge to the jury is considered." It is true that this ruling was, in a subsequent case, declared to be exceptional and unauthoritative;<sup>1</sup> but in a still later adjudication by the same court,<sup>2</sup> while the general rule, that it is inadmissible for the defendant to put the deceased's character in issue, is properly reiterated, the exception established in Tackett's case is recognized as still in force, and as applicable to all cases of self-defence.

§ 613. In *South Carolina* the law is thus expressed by Johnston, J.:<sup>3</sup> "It seems hardly necessary to observe, that evidence of the character and habits of the party slain is proper only so far as they can be supposed to have affected the intention of the slayer, in the fatal act. And, therefore, his general bad character is inadmissible. *The evidence should be confined to a character and habits of violence, treachery, &c., such as might beget reasonable apprehensions of grievous bodily harm, and reduce the other party to the apparent necessity to slay in self-preservation.* Such an apprehension may be also created by particular preceding acts, reasonably connected in point of time, or occasion, with the fatal rencounter; or by threats, as well as by the general habits or conduct of the deceased; and may, therefore, be the proper subjects of evidence. But whether the general character, or conduct, or particular acts of the description mentioned, be offered, it appears to be essential to their reception, that it *should, somehow, reasonably appear that the prisoner knew, or may be supposed to have known, such character or conduct; for, if he was ignorant of them, they could not possibly have modified his intention in the act of slaying.* And, of course, if the relevancy of the testimony does not appear from the prior evidence in the case, the party offering it must lay a foundation for its reception in the proof of facts making it relevant, and the court must,

<sup>1</sup> *Bottoms v. Kent*, 8 Jones (Law), 184.

<sup>2</sup> *State v. Smith*, 12 Rich. (Law) 430.

<sup>3</sup> *State v. Hogue*, 6 Jones (Law), 381.

necessarily, have the power to decide, subject to review upon its relevancy." The last italicized position must be accepted with some modification. Of course if the object of the offer is to prove the *defendant's* opinion of the deceased, then knowledge of the deceased's bad character must be brought home to the defendant (by at least proving that such bad character was notorious), in order to make the evidence admissible. But this is not the only purpose for which we may receive such testimony. If the issue be whether or no the deceased was the assailant, the fact that the deceased was a ruffian, whose business it was to rob and murder, is relevant as a circumstance indicating that he was the assailant, and that the assault was felonious.<sup>1</sup> Independently of this, however, if the evidence shows that the deceased was a notorious ruffian, it should be left to the jury to determine whether the defendant knew what was thus notorious.

§ 614. In *Georgia* the question has been discussed by Chief Justice Lumpkin with his usual strong sense.<sup>2</sup> "This is a nice question," he said, "and one which requires to be treated with delicacy and discrimination. If we unconditionally refuse to allow a defendant, under any circumstances, to have his conduct interpreted by his acts and speech, we shall frequently deliver over the accused, a helpless and hopeless sufferer, to the penalty of the law. If, on the other hand, we permit him to manufacture testimony for himself, the most mischievous consequences would often ensue. For how easy it is to feign fears which are not felt, and shape our course in such a way that premeditated revenge, while it gluts itself in the blood of its hapless victim, will refer to the past, as proof, not merely of innocence, but of the harassing alarm, from the bondage of which the accused has long groaned to be delivered. . . . As a general rule, it is true, that the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under circumstances that showed he did not believe himself in danger. Yet, in cases of doubt, whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated.<sup>3</sup> And in this view we think the evidence was improperly ruled out. Reason-

<sup>1</sup> See *infra*, § 695.

<sup>2</sup> *Monroe v. State*, 5 Ga. 85.

<sup>3</sup> *State v. Quessenberry*, 3 Stew. & Port. 308.

able fear, under our code, repels the conclusion of malice ; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted ? Does it make no difference whether my adversary be a reckless and overbearing bully, having a heart lost to all social ties and order, and fatally bent on mischief ; or is a man of Quaker-like mien and deportment ? — one who never strikes except in self-defence, and then evincing the utmost reluctance to shed blood ? We apprehend that the imminence of the danger, as well as the chances of escape, will depend greatly upon the temper and disposition of our foe. In these cases every individual must act upon his own judgment, and in view of his solemn responsibility to the law. If the assailant intend to commit a trespass only, to kill him is *manslaughter* ; but if he design to perpetrate a felony, the killing is self-defence, and justifiable.<sup>1</sup> Who, knowing the character of Kyd, the pirate, or of the infamous John A. Murrell, would not instantly, upon their approach, armed with deadly weapons, act upon the presumption that robbery, or murder, or both were contemplated ? We would not be understood as applying these terms, or using this illustration in reference to the *actual character* of the deceased, but to the hypothetical case, made by the bill of exceptions.”<sup>2</sup>

§ 615. In *Alabama*, the relevancy of such evidence was settled at an early date in a case that may be regarded as leading in this particular line of decisions.<sup>3</sup> “The circumstances,” said Lipscomb, C. J., “under which this testimony was offered, are not shown, by the record, with sufficient clearness and distinctness, to enable this court to determine, whether it ought to have been admitted or not. That the good or bad character of the deceased, as an abstract proposition, can have no influence on the guilt of the accused, is too clear to admit of controversy. To murder the vilest and most profligate of the human race is as much a crime as if he had been the best, the most virtuous,

<sup>1</sup> 1 Hawk. P. C. c. 28, § 23 ; 1 East P. C. 272.

<sup>2</sup> In respect to this case, Johnston, J., in *State v. Smith*, 12 Rich. Law, 430, says : “I cannot, however, refrain from pointing particularly to the case of *Monroe*, plaintiff in error, v.

The *State of Georgia*, as a controlling authority on the points before us, — a case argued and decided with ability, and in which nearly all the cases referred to were cited.”

<sup>3</sup> *Quessenberry v. State*, 3 Stew. & Port. 308. See *supra*, § 517.

and the greatest benefactor of mankind. But there can be no doubt but that, when the killing has been under such circumstances as to create a doubt as to the character of the offence committed, that the general character of the accused may sometimes afford a clew by which the devious ways, by which human action is influenced, may be threaded, and the truth attained. It is an acknowledged principle, that if, at the time the deadly blow was inflicted, the person who so inflicts has well founded reasons to believe himself in imminent peril, without having by his fault produced the exigency, that such killing will not be murder.

"If the deceased was known to be quick and deadly in his revenge of imagined insults—that he was ready to raise a deadly weapon on every slight provocation; or, in the language of the counsel, his 'garments were stained with many murders,'—when the slayer had been menaced by such a one, he would find some excuse, in one of the strongest impulses of our nature, in anticipating the purposes of his antagonist. The language of the law, in such a case, would be, obey that impulse to self-preservation, even at the hazard of the life of your adversary.

"If the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased for turbulence and revenge. But if the circumstances of the killing were such as to leave any doubt whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated.

"To this course we can see no good objection; and it seems pretty certain that it would often shelter the innocent from the influence of that sound, but not unfrequently severe, maxim of law, that when the killing has been proven, malice will be presumed, unless explained and rebutted. There can be but little danger of the guilty escaping, under the influence of a prejudice created by such testimony, against the deceased. The discretion of the judge will be able to control and prevent such a result. And jurors will be able to comprehend the reason and object of such testimony."

§ 616. Some years afterwards, an effort was made to extend the principle of *Quesenberry v. State* to a case where the defend-

ant sought out and then killed the deceased. But the court properly held that the deceased's bad character could only be set up in cases where the defendant was or believed himself to be attacked.<sup>1</sup> In giving the opinion it was said by Chilton, C. J.: "If the quotation we have made from the case of *Quesenberry v. The State* goes to support the view taken by the counsel for the prisoner in this case, namely, that because a man of 'turbulent and quarrelsome disposition' has threatened to take the life of another, the party menaced may seek him out at his own house and kill him, thus 'anticipating his antagonist's purposes in obedience to the impulse of his nature to self-preservation,' we should not hesitate to declare that it was not the law; but, taking the whole decision together, we do not so understand it. In such case, the character of the deceased is altogether immaterial, as it affords, be it never so bad, no justification or excuse for the killing; and the court should exclude all evidence concerning it. 'The rule,' says an American author, 'undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*; for it would be a barbarous thing to allow A. to give as a reason for his killing B., that B.'s disposition was savage and riotous.' Wharton's Cr. L. 172. See also *State v. Field*, 14 Maine Rep. 248; *Commonwealth v. York*, 7 Law Rep. 507; *Wright v. The State*, 9 Yerg. 342."

§ 617. In a case of still later date,<sup>2</sup> the question was thus reviewed by Walker, J.: "It has been twice decided in this state, and must now be regarded as law, that the testimony, in prosecutions for murder, may be such as will justify the admission of the bad character of the deceased as evidence for the accused. *Quesenberry v. The State*, 3 Stew. & Port. 308; *Pritchett v. The State*, 22 Ala. 39. In *Quesenberry's* case, this court declined to decide in favor of the reception of such evidence, because, the facts not being disclosed upon the record, it could not be perceived that the case presented an aspect justifying it. In *Pritchett's* case, the object of the court seems to have been, to limit the admission of the evidence to cases where it may be considered a part of the *res gestæ*. In both cases, it is carefully and properly denied that the bad character of the deceased can, of itself, lessen the criminality of his murder."

<sup>1</sup> *Pritchett v. State*, 22 Alab. 39.

<sup>2</sup> *Franklin v. State*, 29 Ala. 14.



In 1872,<sup>1</sup> the same view was reaffirmed, though put on the ground that, under the statutes of Alabama, the jury are not only required to pass upon the guilt or innocence of the accused, but also, on conviction, to find by their verdict whether the offence is murder in the first or second degree, and determine the character and severity of the punishment to be inflicted. "Who is prepared to say," argues Peck, C. J., "the punishment should be the same where a turbulent, revengeful, blood-thirsty, dangerous man, reckless of human life, has been slain, who had recently, only a few hours before, violated and outraged the person of his slayer, as though the party slain had been a man of good character and of a peaceable disposition? For myself, I cannot, conscientiously, say so. Although the violence and outrage committed upon the person of the defendant, in this case, might not have been sufficient to reduce the offence from murder to manslaughter, yet, we hold it was clearly proper for the consideration of the jury in determining the turpitude of the crime, and what should be the measure of the punishment to be inflicted. If the evidence of the general bad character of the deceased was proper only in the latter case, it should have been received, and not excluded by the court." But as in all our states the jury have the power of finding the degree, and as on the finding of the degree depends the extent of punishment, the reason just given applies to all cases in which the jury can find for a higher or lower grade. If, therefore, the court meant to say that in *all* cases it is competent for the defendant to put in evidence the ferocious and blood-thirsty character of the deceased, the decision is unsustainable in reason, and is in conflict with the rulings in other states. But if, as appears by the argument of the court, such evidence was held only admissible in support of the position that the defendant naturally at the time of conflict believed his life in danger, and the law laid down by the court was that a person so assailed has a right to consider his assailant's character for ferocity as one of the means for determining as to the desperateness of the attack, then the decision before us is in unison with the general line of authority.<sup>2</sup>

§ 618. In *Tennessee*, the rule is declared to be <sup>3</sup> that, "to con-

<sup>1</sup> *Fields v. State*, 47 Ala. 608.

Central Law Journal of April 9,

<sup>2</sup> See a discussion on this case in 1874.

<sup>3</sup> *Rippy v. State*, 2 Head, 217.

stitute the defence, the *belief* or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the *fear* that it will *at that time* be executed. The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension.”<sup>1</sup>

§ 619. In *Mississippi*, it is said by Fisher, J.,<sup>2</sup> that “what is reasonable ground to apprehend such design must always be as much, or, indeed, more a question of fact for the jury, than a question of law for the court; for while it is true in regard to inanimate subjects, where the fact is the same, the law must also be the same; this is not true, even as a general rule, in this class of cases. The hostile demonstrations of two men may be in every respect the same; yet the party threatened may be placed in imminent peril from the conduct of one, and feel not the slightest apprehension of danger from the other. A design to commit a felony, or to do some great personal injury, may be apprehended in the one case, and it may have no existence whatever in the other. One may excite fear and the greatest apprehensions of danger, while the same demonstrations on the part of another may only excite mirth and ridicule. The question is in both cases the same, — was there imminent danger to life or to the person of the party threatened? As part of the means of arriving at the truth of this fact, the peculiar character of the hostile party is as much a fact for the consideration of the jury as any other fact in issue; and the jury must determine from the hostile demonstrations, whether there was such danger of *this party's* executing his felonious design, as to justify the party killing; in doing so, though there may have been no actual danger from the deceased at that very moment of time, the question in such case is, whether, by the delay, the danger is not increased.”

In a subsequent case, distinguished by the thoroughness with which the question was discussed,<sup>3</sup> Smith, C. J., after reciting the general rule, declares that evidence of the deceased's bad character is admissible when it “is shown that the accused had reasonable ground to apprehend immediate danger to his life from the deceased, the character of the deceased in connection

<sup>1</sup> See also *supra*, § 514.

<sup>2</sup> *Wesley v. State*, 37 *Missis.* 327.

<sup>3</sup> *Cotton v. State*, 31 *Missis.* 504.

with previous threats, &c., may be given in evidence as explanatory of the motives upon the defendant's action. Am. C. L. 235." "The courts in North Carolina, in Alabama, and Tennessee," it is added, "while acknowledging the general doctrine as above stated, have gone a step farther, and hold, that where the homicide has been committed under such circumstances as to create a doubt as to the character of the offence, the general character of the deceased may sometimes be given in evidence. The State v. Tackett, 1 Hawks, 210; Wright v. The State, 9 Yerger 342; Quesenberry v. The State, 8 Stew. & Port. 315. As in the case last cited, where it was held that 'if the circumstances of the killing were such as to leave any doubt whether the defendant had not been more actuated by the principle of self-defence than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated.'

"The principle here recognized is in conflict with the generally received doctrine on the subject, which, as we have seen, excludes evidence in regard to the general character of the deceased, except when it is involved in the *res gestæ*. But without asserting that extreme cases might not be presented, in which evidence of the general vindictive, revengeful, and dangerous character of the party slain might properly be allowed to go to the jury, as explanatory of the state of defence in which the defendant placed himself, although not strictly a part of the *res gestæ*; if the question here presented were tested by the doctrine laid down in the cases cited, it seems clear that the court did not err in ruling out the evidence. For here there is no pretence for the assumption that the homicide was committed under such circumstances as create a doubt as to the character of the offence."

§ 620. In *Indiana*, the rule is thus expressed:<sup>1</sup> "As a general rule, it is the character of the living — the defendant on the trial for the commission of crime — and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, where the question arises whether the accused acted, in the commission of a homicide, upon grounds that justify him in the deed, it would seem that the character of the de-

<sup>1</sup> *Dukes v. the State*, 11 Ind. 557.

ceased, might be a circumstance to be taken into consideration. Especially might this be the case where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made." The court add: "Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight."<sup>1</sup>

§ 621. In *Michigan*, in a case tried in 1872,<sup>2</sup> the defendant offered to prove that "the deceased was a man of high temper and quarrelsome disposition, and known by the defendant to be so at the time of the shooting." The court below refusing to admit this evidence, the ruling was reversed by the supreme court. "The evidence," said Christiancy, C. J., "was admissible, since the knowledge or belief of the prisoner, that the person threatening him with an immediate personal attack is a man of high temper and quarrelsome disposition, is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he has reason to expect from the assailant, as well as the means which, at the moment, he may deem necessary, to guard himself from the threatened danger."

§ 622. In *Minnesota*, precisely the same distinction is taken: "The character of the deceased, *per se*," says Flandrau, J.,<sup>3</sup> "can never be material in the trial of a party for killing him, because it is as great an offence to kill a bad, as it is to kill a good man, or to kill a quarrelsome and brutal man, as it is to kill a mild and inoffensive man. Therefore, if the killing is proven to have been with a felonious intent, the character of the deceased can in no manner affect the result. The rule in respect to the admission of proof of the quarrelsome or violent character of the deceased is this: 'Where the killing is under such circumstances, as to create a doubt as to the character of the offence committed, the general character of the deceased may be shown, because then it becomes a material, and, perhaps, necessary fact, to enable the jury to ascertain the truth, and, as such, is involved in the *res gestæ*; but, without the character is in some way an essential part of the *res gestæ*, it cannot be examined into; because it would be a barbarous thing to allow A. to give as a reason for killing B., that

<sup>1</sup> Aff. in *Holler v. State*, 37 Ind. 57.

<sup>2</sup> *State v. Dumphey*, 4 Minn. 438.

<sup>3</sup> *Hurd v. People*, 25 Mich. 405.

B.'s disposition was savage and riotous.' Am. Crim. Law, 3d ed. 296. It was held in the trial of an overseer for the murder of his employer, that it was not competent for the prisoner to prove the general temper and deportment of the deceased towards his overseers and tenants. *State v. Tilly*, 3 Iredell, 424. When, however, it is shown that the defendant was under a reasonable fear of his life from the deceased's temper, in connection with previous threats, &c., it is sufficiently part of the *res gestæ* to give in evidence as explanatory of the state of defence in which the defendant placed himself. Wharton on Homicide, 215, 220; Am. Crim. Law, 296."

§ 623. On a trial for stabbing in *Iowa*, in 1870,<sup>1</sup> the defendant offered to introduce evidence to show that McMillin, the person stabbed, was a large, powerful, and muscular man, who, when under the influence of liquor, was quarrelsome, ugly, dangerous, and vindictive; that defendant knew these facts; and in connection with this offer, he also proposed to prove, that on the same day, and shortly before the commission of the assault, McMillin had threatened to take defendant's life, of which threat he had been informed only a few minutes previous to the assault. The judge trying the case refused to admit this evidence, and this ruling was reversed by the supreme court, on the ground that the character of the assailant was one of the circumstances from which the intent and motive of the assailed, when defending himself, could be determined.<sup>2</sup>

§ 623 a. In *Missouri*, in 1872, the law is thus tersely presented: <sup>3</sup>—

"When the homicide is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from a well grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself. If such evidence is ever legitimate, the facts in this case show that it was one calling for its introduction."

In *California*, in 1858, the supreme court stated the rule as follows:—

"The other point made is, the exclusion of evidence of the

<sup>1</sup> *State v. Collins*, 32 Iowa, 36.

<sup>2</sup> *State v. Keene*, 50 Mo. 357.

<sup>3</sup> See *supra*, § 518.

character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defence. It is no excuse for a murder that the person murdered was a bad man ; but it has been held that the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal. But the record must show this state of case. This does not.”<sup>1</sup>

In 1871, this view was reaffirmed.<sup>2</sup>

“The prisoner,” said Wallace, J., “offered to show that the deceased was a man of violence, of turbulent character, and blood-thirsty. The evidence was excluded, and, we think, properly. The deceased was unarmed when he was assaulted ; and the prisoner approached him from behind, and, while the deceased was peaceably conversing with an acquaintance, shot him in the back, the ball entering his body ‘a little to the left of the backbone, nearly at the edge of the shoulder-blade,’ giving him a mortal wound ; and when he had fallen, the prisoner shot him again, and a third time, each wound being, in the opinion of the medical witness, mortal. It is said, in *People v. Murray*, 10 Cal. 310, that if a contest has occurred between the deceased and the prisoner, ‘the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal.’ But here there was, confessedly, no contest, nor even an altercation between the deceased and the prisoner at the time of the killing ; for, as we have seen, the shot was fired from behind, and the deceased does not seem to have been even aware of the proximity of the prisoner at the moment. Under such circumstances, the character of the deceased, as being peaceable or otherwise, is of no import.”<sup>3</sup>

§ 624. *Inapplicability of cases cited to the contrary.*—Nor can the cases cited against this position be relied on to meet it on principle. Thus in a Maine case we find the following from Emery, J., when giving the opinion of the supreme court :—

“It would not be allowable to show, on the trial of an indict-

<sup>1</sup> *People v. Murray*, 10 Cal. 309.

<sup>2</sup> See also *supra*, § 516.

<sup>3</sup> *People v. Edwards*, 41 Cal. 640.

ment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him. 1 Phil. Ev. 143. Although the deceased may have been a savage and quarrelsome man when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. *We look in vain, among the attending circumstances of the melancholy catastrophe, for a provocation or an excuse, for the resort to the deadly weapon, which the defendant used, to destroy the life of his victim.* And to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime, of which the defendant stood charged, to justifiable or excusable homicide."<sup>1</sup>

This is correct law, for A. cannot be allowed to attack and kill B. because B. is a cut-throat. But this does not touch the question whether, when B. attacks A., B.'s character as a cut-throat is not justly to be considered by A. in determining whether he is required to take extreme measures in self-defence. The same criticism is applicable to other cases sometimes cited to the same point.<sup>2</sup>

§ 625. *In Massachusetts, evidence held inadmissible.*—In Massachusetts we find decisions which it is more difficult to explain consistently with the line of authorities which have just been given. The first is a celebrated case,<sup>3</sup> in which, it must be remembered, there was no evidence that the defendant was acting in self-defence. Mr. Dana, for the defendant, proposed to show "that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as fighter." In supporting this offer Mr. Dana announced the "vital question here is whether there was provocation or mutual combat." The chief justice said: "The general rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue, it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit

<sup>1</sup> State v. Field, 14 Me. 244.

State v. Chandler, 5 La. An. 489;

<sup>2</sup> State v. Thawley, 4 Harr. 562;

State v. Chopin, 10 La. An. 458.

State v. Hogue, 6 Jones N. C. 381;

<sup>3</sup> Com. v. York, 7 Law Rep. 497;

9 Metc. 93.

if we go beyond the *res gestæ*. The only exception is rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In the case from Carrington & Payne (*R. v. Smith*), we think the expression probably arose from boasts made by the deceased at the time, and proved as parts of the *res gestæ*. The cases from Hawks, and from Stewart & Porter, stand alone, and are not of such authority as to require us to leave the established course of practice."

§ 626. In a subsequent case,<sup>1</sup> the line was drawn still more rigidly. A *prima facie* case of self-defence being made out by the defendant, the following proceedings took place:—

"J. G. Abbot, for the defendant, offered evidence that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm;" and cited *Quesenberry v. The State*, 3 Stewart & Porter 308; *The State v. Tackett*, 1 Hawks, 210; *Oliver v. The State*, 17 Alab. 599; *Com. v. Seibert*, Wharton on Homicide, 227.

"J. H. Clifford (attorney general) objected to the admissibility of the evidence, and cited *Com. v. York*, 7 Law Reporter, 507, 509.

"By the Court: The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestæ*; and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant."

§ 627. Four years afterwards the question was revived in a case in which the evidence was that after an altercation the deceased seized the plaintiff by the throat, the deceased's brother standing by with a shovel, and that the defendant, while choking under the deceased's grip, shot the deceased. The surgeon who made a *post-mortem* proved that the *rigor mortis* was peculiarly

<sup>1</sup> *Com. v. Hilliard*, 2 Gray, 294 (1854).



severe. The defence then proposed to ask the surgeon: "Was not Jeremiah A. Agin a very strong and muscular man? Did not the *rigor mortis*, being very marked, indicate that Agin was a remarkably powerful man?" But the judge excluded these questions.

The defence then offered to prove that "Agin was an experienced and practised garroter." "The judge excluded this evidence; but allowed the defendant to prove how he was actually seized by the throat, and then to show by experts, the anatomical structure of the parts, and the various effects of such seizure and compression on the individual's consciousness, strength, life, and system generally." In the supreme court, Bigelow, J., said: "Evidence tending to prove the great muscular vigor and strength of the deceased was clearly incompetent. It did not show provocation, or that the homicidal act was committed in self-defence, or was otherwise excusable or justifiable. The issue was not as to the degree of strength and violence which the deceased was capable of exerting, but how severe and aggravated was the assault which he actually committed on the prisoner. *Com. v. Hilliard*, 2 Gray, 294. For a like reason, evidence that the deceased was in the habit of seizing persons in a peculiar manner by the throat was inadmissible. The defendant was allowed to prove the manner in which the deceased actually assaulted him at the time of the homicide, and this was the only evidence on the point which was relevant or material to the issue."<sup>1</sup> Yet that the defendant's conception, derived from his prior knowledge of the deceased, of the nature of the attack upon him, is a matter for the jury, is conceded in a remarkable homicide case tried in 1868, by Chief Justice Chapman, sitting with Judges Foster, Wells, and Colt. The defence was that the killing was in prevention of an attempt by the deceased to commit an unnatural crime on the defendant. The court, under objection, admitted evidence by the defence that on prior occasions, going as far back as nine years, attempts to commit an unnatural crime had been made by the deceased on the defendant.<sup>2</sup>

But whatever we may think of the rulings in York's case and Hilliard's case, that in Mead's case cannot be sustained. The prosecution's evidence showed that the defendant was attacked by the deceased. The defendant offered to prove that the de-

<sup>1</sup> *Com. v. Mead*, 12 Gray, 168.

<sup>2</sup> *Com. v. Andrews*, Pamph. Tr. 1869.

ceased was an experienced and practised garroter, leaving it to be inferred that the deceased's grip on the throat was that which garroters apply with such deadly effect. Had this been proved, the defendant would have been excusable in killing the deceased, or at the most, could only have been convicted of manslaughter. But the court refused to hear evidence to show that the deceased was a garroter, and consequently precluded the defendant from offering a legitimate defence. Very different was the course in Selfridge's case, — a case in which, it will be recollected, the defendant, armed for the purpose, shot down at sight a young man of eighteen years who was armed only with a walking cane. On the trial, the defendant was allowed to call a physician to prove that "in college, defendant was feeble in muscular strength, more than any man of his size in his class;" and was permitted to show that he expected "to be attacked by some bully;" while it was argued that the deceased was a young man in the prime of youthful vigor. Did Judge Parker, who charged the jury, exclude these points from their consideration? So far from doing so, he told the jury that the defendant was excused if the danger was *apparent*, and what was apparent he defined in the following remarkable words: "Whether the firing of the pistol was before or after a blow struck by the deceased, there is a point of more importance for you to settle, and *about which you must make up your mind from all the circumstances proved in the case*; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, *the muscular debility or vigor of the defendant*, and his power to resist or fly." The jury were also told that the defendant had a right to defend himself from the wrong "*apparently* intended by the deceased." But how "*apparently*?" The only reply is, that all those circumstances which *appeared* to the defendant, from which he might conclude himself in danger, constitute such apparenacy.

*Summary of law.* — Dismissing, therefore, the decision in *Com. v. Mead* as inconsistent alike with reason and authority, we may hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing either (1) that the de-

fendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that he was in such apparent extremity as to make out a case of self-defence; or (3) that the deceased's purpose in encountering the defendant was deadly. Of course it is admissible for the defendant, in order to excuse his resort to fire-arms, to prove that he was so overmatched as to strength, that he had, when attacked, no other means of escaping from death or great bodily harm. But such evidence can never be received for the purpose of justifying an attack by the defendant on the deceased.

## CHAPTER XX.

### PRESUMPTIONS.

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#### I. CORPUS DELICTI MUST BE PROVED AS A PREREQUISITE.

§ 628. BEFORE presumptive evidence, tending to connect the defendant with the crime, can be invoked, the *corpus delicti* must be established beyond reasonable doubt.<sup>1</sup> "I would never," says Lord Hale, "convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead."<sup>2</sup> Equally emphatic was the language of another great judge: "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."<sup>3</sup> And the Roman law is the same: "*Diligenter cavendum est judici, ne supplicium praecipitet, antequam de crimine constiterit.*"<sup>4</sup> "*De corpore interfecti necesse est ut constet.*"<sup>5</sup> The death in such a case should be distinctly proved,

<sup>1</sup> See *State v. Davidson*, 30 Vt. 377; *Smith v. Com.* 21 Grat. 809; *State v. Keeler*, 28 Iowa, 553; *People v. Bennett*, 49 N. Y. 137.

<sup>2</sup> Hale P. C. 290; *Tyner v. State*, 5 Humphreys, 383; and see for an interesting case on the *corpus delicti* in larceny, *R. v. Burton*, 24

Eng. Law & Eq. 551; 6 Cox C. C. 293.

<sup>3</sup> Lord Stowell, in *Evans v. Evans*, 1 Hagg. C. R. 105.

<sup>4</sup> *Matth. de Crim.* in Dig. lib. 48, tit. 16, ch. 1.

<sup>5</sup> *Matth. Probat.* ch. 1, n. 4, p. 9.

either by direct evidence of the fact, by inspection of the body,<sup>1</sup> or by circumstantial evidence strong enough to leave no ground for reasonable doubt.<sup>2</sup>

§ 629. *Double character of corpus delicti.*— In most cases, however, it must be remembered, the proof of the crime is separable from that of the criminal. Thus, the finding of a dead body, or a house in ashes, indicates the probable crime, but does

<sup>1</sup> 1 Stark. Evid. 575, 3d. ed. c. 5.

<sup>2</sup> People v. Ruloff, 3 Parker C. R. (N. Y.) 401.

See Tyner v. State, 5 Humphreys, 383; Mitchum v. State, 11 Ga. 615. The reference to facts, which, having in themselves no bearing upon the guilt or innocence of the party, are important as leading to inferences in regard to it, is called, in Germany, "indicatory evidence." On this point, the curious are referred to Mittermaier von Beweise, p. 402; Martin, in Demme's Annalen des Criminalrechts, vol. iii. p. 215; Bauer, Theorie des Anzeigenbeweises; Quistorp Grunds, sec. 676; Henke Darstellung, sec. 99; Tittman Handb. iii. p. 495; Kitka Beweisler, p. 13. Of the old jurists, see Blanci de indiciis, Venet, 1545; Bruni Guido de Suzaria de indiciis et tortura, Lugd. 1546; Crusius de tortura et indiciis, Francof. 1704; Menochius de Præsumt., Colon. 1686; Tabor de indiciis delict, Giess. 1767; Cocieji de fallæ, Crim. indic. in ejus exerci. cur. p. l. uro. 75; Reinhardt de eo quod circa reum ex Præsumt. Convinc. et Cond. Just. est Erford, 1732; Woltaer femiol. Crim. quæd Capita Ital. 1790; Puettman de Lubrico indic. Indol. Lips. 1785; Nani de indiciis eorumque Ususu, Ticin. 1781; Pagano logica de Probabili Applicata a Guidizi Crimin. Milan, 1806; Heinroth in Hitzig's Zeitschrift, No. 42. See also Wills's Essay on the Rationale of Circumstantial Evidence. The term "Circumstantial Evidence" is objected to by the German jurists (see Bauer, p. 1214).

Indications are divided into: 1st.

Those which are drawn from the particular relation of the circumstance to the fact in issue, so as to implicate a particular person, either as a participant in the crime, or as a possessor of information in regard to it; *e. g.* where a knife, the possessor of which is known, is found at the *locus in quo*. 2d. Those which set out, from general observations of human nature, inducing suspicion against particular individuals, by reason of particular moral qualities, motives, information, skill, or demeanor; *e. g.* suspicions on the grounds of enmity towards the deceased, or interest; see also Archiv. des Criminals, xiv. p. 587. The first species justifies the inquisitor in arresting and hearing the person implicated, and demanding an explanation; while in the latter case, he dare not go further than to cause the person to be watched or examine him as a witness. There is also a distinction between immediate indications (Bayl Beitrage zum Criminale, p. 215; Bentham, traité i. p. 313), which authorize the inference in regard to the fact, without the intervention of other circumstances; and mediate ones, which only prove such facts from which a further inference can be drawn, in regard to the very matter at issue; *e. g.* approval of the crime, which leads to the inference of a disposition to commit it. The doctrine of presumptions of law and presumptions of fact, it is argued, is therefore inapplicable to criminal investigations.

not necessarily afford any clew to the perpetrator, and here it is necessary to draw a distinction relative to the effect of presumptive evidence. The *corpus delicti* in such cases is made up of two things: first, certain facts forming its basis; and secondly, the existence of criminal agency as the cause of them.<sup>1</sup>

§ 630. *Body of deceased must be accounted for.*—With respect to the former of these, it is the established rule that the facts which form the basis of the *corpus delicti* ought to be proved beyond reasonable doubt.<sup>2</sup> This is particularly necessary in cases of homicide,<sup>3</sup> where the rules laid down by Lord Hale seem to have been generally followed, namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or if found in a state of decomposition, or reduced to a skeleton, that it should be identified by dress or circumstances, as in the Webster case, where the teeth formed the

<sup>1</sup> People v. Bennett, 49 N. Y. 187. See this illustrated in Pitts v. State, 43 Missis. 472. The latter feature, viz., criminal agency, is often lost sight of, but is as essential as is the object itself of crime. *Acts*, in some shape, are essential to the *corpus delicti*, so far as concerns the guilt of the party accused. *Facta sola censenda, dicit* (M. Cato), *atque in iudicium vocanda, sed voluntates nudas inanesque neque legibus neque poenis fieri obnoxias*. Gellius VII. 8. The Roman law speaks expressly to this point: L. 18. D. de poen. (48. 19.) *Cogitationis poenam nemo patitur*. L. 53. § 2. D. de verb. sign. (50. 16.) . . . *nec consilium habuisse noceat, nisi et factum secutum fuerit*. L. 225. D. eod. *Fugitivus est, non is, qui solum consilium fugiendi a domino suscepit, licet id se facturum iactaverit, sed qui ipso facto fugae initium mente deduxerit . . . ideo fugitivum quoque, et errorem non secundum propositionem solam, sed cum aliquo actu intelligi constat*. can. 14. Caus. 33. qu. 3. Dist. I. de poenit. [See, at the same time, can. 29. eod. Si propterea non facis furtum, quia

times, ne videaris, intus fecisti, in corde fecisti: furti teneris, et nihil tulisti. can. 30. eod. Si cui etiam non contingat facultas concumbendi cum coniuge aliena, planum tamen aliquo modo sit, id eum cupere, et, si potestas detur, facturum esse, non minus reus est, quam si in ipso facto deprehenderetur.] So also Tacitus Annal. XI. 4. *Vocantur post haec patres, pergitque Suilius addere reos equites Romanos illustres, quibus Petra cognomentum. at caussa necis ex eo, quod domum suam Mnesteris et Poppaeae congressibus praebuissent. Verum nocturnae quietis species alteri obiecta, tamquam vidisset Claudium spicea corona evinctum, spicis retro conversis: eaque imagine gravitatem annonae dixisset. Quidam pampineam coronam albertibus foliis visam, atque ita interpretatum tradidere, vergente autumno mortem principis ostendi. Illud haud ambigitur qualicumque insomnio, ipsi fratrique perniciem allatam.*

<sup>2</sup> See, however, State v. Lamb, 28 Mo. 218, where a laxer view was taken.

<sup>3</sup> See Ruloff v. People, 4 E. P. Smith (N. Y.), 179.

chief means of identification, and in a leading English case, where the same test was successfully applied to a body exhumed after a lapse of twenty-three years.<sup>1</sup> There are some old cases which go far to establish the sound policy of this rule. One given by Sir E. Coke has been already cited, where an uncle being unable to account for the disappearance of a niece of whom he had the bringing up, was executed for her murder, though it afterwards appeared that she had fled from home, to which, in fact, after a lapse of some years, she returned; and Doctor Hitzig gives several illustrations to the same effect.<sup>2</sup> Lord Hale even tells us that in his own time, after a murderer was convicted and executed, the "deceased" returned from sea, where he had been sent against his will by the accused, who, though innocent of the murder, was not entirely blameless.<sup>3</sup>

§ 631. Two brothers named Boorns, who, on being charged in Vermont with the murder of a man whose body was alleged to have been identified, were convicted and sentenced to death, chiefly on their admissions, were relieved from execution by the reappearance of their alleged victim.<sup>4</sup>

§ 632. In Illinois, in 1841, three brothers named Traylor were arrested on the charge of murdering a man named Fisher, who, when last seen, had been in their company. Strong circumstantial evidence was produced showing the traces of a death struggle in the spot where the homicide was alleged to have been committed; and the case was fortified by expressions alleged to have been subsequently used by one of the brothers as to his having become legatee of the deceased's property. The examination had scarcely finished, before one of the three defendants made a confession, detailing circumstantially the whole transaction, showing the previous combination, and ending with a direct statement, under oath, of the homicide. To the amazement of the whole country, however, the deceased made his appearance in just time enough to intercept a conviction; and the

<sup>1</sup> R. v. Clewes, 4 C. & P. 221; 2 Wh. & St. Med. J. § 1237. And see *infra*, illustrations in note to § 640.

<sup>2</sup> Der neue Pitaval, &c.

<sup>3</sup> 2 Hale P. C. 290; Best's Theory, App. Case 5. See also the false confession of a man named John Sharpe, for the murder of Catherine

Elmes, Ann. Reg. 1833, p. 74; and a series of cases in Blackwood's Magazine for July, 1860, p. 54.

<sup>4</sup> N. Am. Review, vol. 10, p. 418;

5 Law Reporter, 195; 1 Greenl. on Evid. § 214; and see 1 Wh. & St. Med. J. (1873) § 200 a.



only way of accounting for the confession which had been produced was, that the party who made it, in the desperation of impending conviction, took this method of cutting short suspense.<sup>1</sup>

§ 633. Should the decease be proved by eye-witnesses, the inspection of the body after death may, of course, be dispensed with. Thus, in a case in England,<sup>2</sup> the prisoner, a seaman on board the ship *Eolus*, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by a blow from a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that while the ship was lying off the coast of Africa, where there were several other vessels near, the prisoner was seen one night to take the captain up in his arms, and throw him into the sea, after which he was never seen or heard of; but that near the place on the deck where the captain was seen was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels; but the court, although they admitted the general rule of law, left it to the jury to say upon the evidence whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed.<sup>3</sup>

§ 634. "The sudden disappearance of a man of known and established habits without apparent cause, and the failure to find him or any trace of him, after diligent search, although they may lead to a strong suspicion that he has come to an untimely end, yet are not alone sufficient proof of his death, because the fact may be accounted for on the hypothesis (however improbable) that he may have absconded and eluded all inquiry, or be kidnapped and concealed, and be still alive. But if his dead body be found, it is a fact in its nature conclusive. It has been sometimes said by judges, that a jury ought never to convict in a case of homicide, unless the dead body be found and identified.

<sup>1</sup> See 4 Western Law Journal, 25; <sup>2</sup> R. v. Hindmarsh, 2 Leach C. L. Lamont's Life of Lincoln, cited in 1 569.  
Wharton & St. Med. Jur. § 794.

<sup>3</sup> See also Stocking v. State, 7 Ind. 326; U. S. v. Williams, 1 Cliff. C. C. 5.

This, as a general proposition, is undoubtedly true and correct; and disastrous and lamentable consequences have resulted from disregarding the rule. But, like other general rules, it is to be taken with some qualification. It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory. As in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder. But, if the body can be found and identified, it goes conclusively to one of the facts necessary to be proved,—the death of the person alleged to have been killed. Such proof is relied on in the present case. It is for the jury to judge of it.”<sup>1</sup>

§ 685. Where a girl was indicted for the murder of her child, aged sixteen days, the evidence was that she was proceeding from Bristol to Llandogo, and was seen near Tintern, with the child in her arms, at six P. M.; she arrived at Llandogo between eight and nine P. M., without the child; and the body of a child was afterwards found in the river Wye, near Tintern, which appeared not to be the child of the prisoner: It was held that she must be acquitted, and that she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that the child was actually dead.<sup>2</sup>

§ 686. Mr. Bentham suggests the illustration of the decomposition of the body in lime, or by any other of the known chemical menstrua, or of its being submerged in an unfathomable part of the sea, and asks whether in such a case, when the homicide is proved *aliunde*, the defendant is to be acquitted.<sup>3</sup> Unsuccessful attempts of such a kind have undoubtedly been made, and that the result may have been obtained, appears probable from a melancholy instance in Philadelphia, where a gentleman of high legal standing, who had won the respect and kind feelings of all, and to whose professional and personal worth I take this opportunity of paying tribute, was in less than eight hours so entirely consumed by the fire in a cellar of a burning house, into which he had fallen, as to leave scarcely a vestige of bone or flesh behind.

<sup>1</sup> Shaw, C. J., *Com. v. Webster*,  
3 Cush. 535; Bemis's Webster case,  
479.

<sup>2</sup> *R. v. Hopkins*, 8 C. & P. 591 —  
Abinger.

<sup>3</sup> Bentham, *Jud. Ev.* 234.

§ 637. On the trial of Dr. Webster, the evidence was that in the furnace attached to the defendant's laboratory were found portions of lime and blocks of mineral teeth. These fragments, together with others elsewhere found, having been collected, were identified as those of Dr. Parkman, the teeth having been declared by a dentist to be parts of a set made for the deceased. It was evident that an attempt had been made to destroy the body by fire or other chemical agency, and the testimony of experienced medical gentlemen was taken with reference to this point. Dr. Strong testified that he had frequently found it necessary to get rid of the remains of a subject by fire; and that upon one occasion, wishing to consume the flesh of the body of a pirate, he had placed it upon a large wood fire, and succeeded in concluding the operation in the course of one night, and the forenoon of the next day, although called upon during that time by the police to know what made such a smell in the street.<sup>1</sup> Dr. Jackson says "that the flesh of a human body, if cut up into small pieces and boiled in potash, might be dissolved in two or three hours. Next to this, the best substance used in dissolving or disposing of a human body would, I should think, be nitric acid; and the difficulty or danger attendant upon its use, so far as the evolution of noxious vapor is concerned, would depend upon the degree of heat applied. If a gentle heat were used, very little nitrous acid would be given off; but if the acid were boiled there would be a great deal, though the dissolution of the body would be most rapid at a boiling temperature."<sup>2</sup> It is clear that in such cases the *corpus delicti* may be proved circumstantially or inferentially.<sup>3</sup>

<sup>1</sup> Bemis's Report of Webster case, 69.

<sup>2</sup> Bemis's Report of Webster case, 75, 76.

<sup>3</sup> Ibid.; State v. Williams, 7 Jones N. C. 446. "Where the body is found shortly after the commission of the crime, and the face has not been disfigured by the violence employed, or by accident, or in the natural course of decay, the identification is made in the form of direct and positive proof of the fact by those to whom the deceased was known. But where the

features have been destroyed, the body may be identified by circumstances,—as by the dress, articles found on the person, and by natural marks upon the person. In Colt's case, where a considerable portion of the face had been beaten in by blows, and the progress of decay had otherwise rendered direct recognition impossible, the body was identified in this way. In McCann's case, where the face of the deceased had been eaten away by hogs, identification was effected in a similar manner.

§ 638. The weight of authority now clearly is that, in cases of alleged infanticide, it should be clearly proved that the child had acquired an independent circulation and existence, and it is not enough that it had breathed in the course of its birth;<sup>1</sup> and a very eminent and humane American judge extended the same test, though with questionable propriety, to the case of a child some months old, whom the mother, during an attack of puerperal fever, had thrown out of the window of a steamboat.<sup>2</sup> If, however, a child has been wholly born, and is alive, it is not essential, as has been already seen, that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after birth.<sup>3</sup>

§ 639. In trials for poisoning it should be observed that it does not necessarily follow, even where poison has been administered,

Even where nothing but the skeleton has been found, it may sometimes be identified by peculiar marks, and by objects discovered near it. In the case of *Rex v. Clewes*, 4 Carrington & Payne, 221, the body of a man was, after a lapse of twenty-three years, identified by his widow from some peculiarity about the teeth, and by a carpenter's rule and a pair of shoes found with the remains and also identified. But in examining skeletons, great attention should be paid to their anatomical characteristics, upon which the important facts of the age and sex of the person depend; as these may be decisive of the whole case in favor of the accused.

"Where the body has been purposely mutilated, and especially where it has been dismembered, with a view to its destruction by fire or otherwise, its identification becomes a matter of greater difficulty; the head being usually destroyed first, for the very purpose of preventing recognition. But it occasionally happens that even the agency of fire, which is generally selected as the readiest and most effectual means of destruction, proves inadequate to the purpose contemplated.

In Webster's case, the head of the deceased had been placed in a furnace and exposed to a strong heat for a considerable time. But some blocks of mineral teeth resisted the action of the fire so effectually, that they were identified by a dentist as parts of a set of artificial teeth which had been made for the deceased, and which the latter wore at the time he disappeared. Some other portions of the body, which had not been subjected to the action of fire, were also identified by peculiar appearances. A case is mentioned by Mr. Wills, in which the remains of a female, consisting merely of the trunk of the body, from which the other parts had been cut, were identified by a curious train of circumstantial evidence, embracing several facts of conduct on the part of the prisoner." Burrill, *Circumst. Ev.* p. 681-2.

<sup>1</sup> Wills, p. 205; *R. v. Poulton*, 5 Car. & Payne, 329. See 2 Wh. & St. Med. Jur. § 128.

<sup>2</sup> *U. S. v. Hewson*, 7 Boston Law Reporter, 361 — Story, J.; though see *Com. v. Harman*, 4 Barr, 269.

<sup>3</sup> See *R. v. Brain*, 6 Car. & Payne, 350.

that death has resulted from other than natural causes.<sup>1</sup> The presence of poison may be ascertained by the symptoms during life, the *post-mortem* appearances, the moral circumstances, and by far the most decisive and satisfactory evidence, the discovery by chemical means of the existence of poison in the body, in the matter ejected from the stomach, or in the food or drink of which the sufferer has partaken.<sup>2</sup>

§ 640. *Identity of deceased may be proved inferentially.* — It may be regarded as settled law, that although it is necessary, in a case of murder, that identity should be proved, yet this identity may be shown as effectively by inferences from facts, as from the positive testimony of witnesses who saw the alleged body of the deceased.<sup>3</sup> And there may be cases in which, after a *prima facie* case from the prosecution, the defence, when it has peculiar means of knowing the history of the deceased, may have thrown on it the burden of disproving death.<sup>4</sup>

<sup>1</sup> Wills on Circum. Ev. 209.

<sup>2</sup> 2 Wh. & St. Med. Jur. § 321, 1022.

<sup>3</sup> See Whart. Cr. L. 7th ed. § 732 *et seq.*; Hamby v. State, 26 Tex. 523; R. v. Cheverton, 2 F. & F. 833.

X When the head of the murdered man having been found severed from the body, and taken by a physician, was preserved in alcohol and exhibited at the trial, it was held competent to rebut this evidence, for an expert to state the character of the changes produced by death, and to explain how far such changes had acted on the head in question, but not to answer whether it was possible to identify the head. State v. Vincent, 24 Iowa, 570.

A brother of the deceased, on a trial for murder, testified that, five months after the alleged murder, he saw a body claimed to be the body of the deceased, and examined it; he testified to several points of resemblance. He was asked by the government whether it was, in his opinion, the

body of the murdered man. It was held that the question was incompetent, the question being for the jury, the body having been much decomposed and he having stated all the points of resemblance. People v. Wilson, 3 Parker C. R. 199.

In Lowenstein's case (Albany, 1874, p. 332), Judge Learned thus sums up the evidence of identity of the remains: "The question for you is, was that body John D. Weston's body? The facts are, first, that it was the body of a one-armed man; the same arm was gone in both cases. Another fact which the physicians testify to is the peculiar flexibility of the finger. There is some discrepancy as to whether it was the same finger in the body as with Weston, I think. The third peculiarity was the separation of the teeth; they were further apart than usual. That peculiarity is said to have existed in both. As to the size and mode of wearing a moustache, the man is said to be, I think, of such a size as to correspond with

<sup>4</sup> State v. Vincent, 24 Iowa, 750.

§ 641. *Corpus delicti includes not merely proof of death of deceased, but proof that this death was criminal.* — It has been al-

John D. Weston. Then you have the further fact about his coat, pantaloons, and vest, and I think the shoes and hat and the alpaca coat; they are all identified by John Weston's wife. You will remember if I am wrong in the details. She testified to shortening the pantaloons and to mending the coat. There is also a pair of eye-glasses which I think she identified. At any rate she says she fastened a similar pair to his suspenders."

In Goldsborough's case, reported in Warren's *Miscellanies*, Blackwood's ed. 1845, p. 93, the evidence was that the murder of Huntley, the deceased, was committed in 1839. The body was found in 1841, by an open drain. The chief point of identification relied on was a peculiar tooth which Huntley had on one side of his head. Only one half of the bones of the supposed body were found, and none of the clothing was discovered. The skull was fractured and filled with dirt, and not a single particle of flesh or muscle remained. As to the tooth, Mr. Warren says (p. 106-7):—

"When first discovered, it would appear certain that there was a very prominent tooth on the left side of the lower jaw, which arrested the attention of all those who saw it; but soon afterwards, owing to the inconceivable carelessness and stupidity of those intrusted with the custody of such all-important articles, and who permitted every idle visitor to have free access to them, the tooth in question, alas, was lost! I confess I have seldom experienced such a rising of indignation as when this remarkable deficiency of evidence was thus accounted for."

"He," the judge, "left it fairly to them," the jury, "to judge whether

sufficient had been done to satisfy them beyond all reasonable doubt that the bones produced were those of Huntley; but accompanied by a strong expression of his own opinion that the evidence was of an unsatisfactory nature. Unless they were satisfied on *that* head there was an end of the case; for the very first step failed proving that Huntley was dead. If, however, on the whole of the facts, they should feel satisfied in the affirmative, then came the two other great questions in the case, Had Huntley been murdered? And by the prisoner at the bar?" The defendants were properly acquitted.

On this subject see fully 2 Whart. & St. Med. Jur. § 289, 1218.

In the 5th ed. of Casper's *Gericht. Med.* (Liman's ed. Berlin, 1871, Bd II. s. 120), occur the following cases of identification of remains:—

*Identification after three separate exhumations.*—Schall was suspected of the robbery and murder of Ebermann, who had disappeared. At the first exhumation of the body claimed to be that of Ebermann, a woman, a stranger in the neighborhood, swore that the body was that of her husband who had recently disappeared, an allegation which was chargeable either to delusion on her part, or to complicity with Schall. Five months afterwards the body was again exhumed, for the purpose of determining whether it exhibited certain tattoo marks similar to those proved to have been on the person of Ebermann; but decomposition had so far progressed as to make this method of identification unavailable. Two years and a half after the first burial, the head (which had been cut off in the murder) was for the third time exhumed; the ground be-

ready stated that the *corpus delicti* includes two things: first, the objective, and then the subjective elements of criminality; in

ing that Ebermann's mistress claimed that his teeth were so peculiar that she could at once identify them. The skull was submitted to Casper for examination. One question to be determined was whether the fatal shot had pierced from behind the left ear into the head. This question, from the shattered and decayed condition of the bones, could not be definitely answered. The teeth, however, remained unaffected by decay. These were recognized by the mistress of Ebermann at the first glance. To Casper was put the question whether the teeth met the description of them previously given by the brother of the deceased. He answered that there was a similarity, but not such as would justify, on this ground alone, a positive identification. The result of the third exhumation was to produce evidence consistent with the hypothesis of Schall's guilt, and, so far as concerns the testimony of the deceased's mistress, positively confirmatory of that hypothesis.

*Identification after a burial of eleven years.* — Mrs. V., a widow, died on May 20, 1848, after pains in the stomach and vomiting, which lasted for two days. Although reports of foul play were prevalent, no examination took place for eleven years, when these suspicions received such additional confirmation that proceedings were instituted against the husband of the deceased and his second wife. On March 30, 1859, the coffin was opened, and exhibited a human skeleton. The first point was to identify this with Mrs. V. Relatives of the deceased testified to the color of her hair, and that she had four artificial teeth, connected by a gold band. The testimony as to her clothing was imma-

terial, as in the coffin only a few fragments of stockings could be found. The coffin had decayed, and was filled with sand, among which were found shavings of wood, and vegetable substances, apparently laurel leaves, and twigs of a cone-bearing tree, *thuja*. In attempting to take out the body, the skull was detached, and with it a mass of blonde-reddish hair. The witnesses, however, hesitated to identify the hair, and declared that it must have been changed by its long burial, which was not impossible. But in taking the skull out of the sand, four artificial teeth, connected by a golden band, fell out, and these the witnesses at once positively identified as belonging to the deceased. Two firm back teeth still remained on the upper jaw, and in the under jaw eight teeth remained. No part of the body retained any odor. The remains of the upper and lower extremities were covered with a thin, sticky, inodorous, dark-brown substance. Search was in vain made for the contents of chest and stomach. The bones of the whole skeleton separated in being moved. No trace of an injury was discoverable on the bones. The sticky substance just noticed, together with the sand, were then set aside for chemical examination.

*Identification twenty-one years after death.* — Of this a case, dependent upon peculiarities of the teeth, and of certain articles of the deceased found near his body, is given in *R. v. Clewes*, 4 C. & P. 221.

In an interesting North Carolina case (*State v. Williams*, 7 Jones N. C. 446), where shortly after the disappearance of the deceased, a woman named Peggy Hilton, human bones, and hair-pins, similar to some which

other words : first, that the overt act took place ; secondly, that it took place through criminal agency. Of homicide, therefore, it must be held essential to a conviction, first, that the deceased should be shown to have been killed ; and secondly, that this killing should have been proved to have been criminally caused. And on the well known principle that in capital cases this criminal agency of the defendant cannot be proved on his confession alone, without proof of the *corpus delicti*, it must not only be shown, to justify a conviction in such a case, that the deceased was dead, but that his death was criminally produced. Unless the *corpus delicti* in both these respects is proved, a confession is not by itself enough to sustain a conviction. This is strikingly illustrated in a trial in Mississippi, in 1870-71, where the evidence was, that the circumstances of the deceased's death, and the state of his body, indicated poison by stramonium, or Jamestown weed ; but that the same symptoms might have been caused by congestions of the brain, stomach, or heart ; and it was properly ruled by the court, that a confession of the defendant, that he had administered to the deceased Jamestown weed, was not enough to warrant a conviction, the *corpus delicti* not being fully proved.<sup>1</sup>

## II. CLASSIFICATION OF PRESUMPTIONS.

§ 642. The term "Presumption" is popularly used to include three distinct methods of proof : *First*, Irrebuttable Presumptions, — *Presumptiones juris et de jure*, embracing Fictions of Law ; <sup>2</sup> *secondly*, Rebuttable Presumptions of Law, — or *Pre-*

she had shortly previously purchased, were found in a heap of burned logs near her house, it was held that there was evidence to go to the jury tending to establish the identity of the remains, and that their verdict establishing such identity would not be set aside.

A remarkable instance of confusion of testimony as to the identity of a dead body is reported in 2 Wh. & St. Med. J. 3d ed. § 1239. The trial of Udderzook, in West Chester, Pennsylvania, in November, 1873, for the murder of Goss, hinged on the question whether certain remains found,

shortly after the disappearance of Goss, were those of Goss. The question of this identity, and the weight to be allowed to inferential evidence as to the identification of human remains, are discussed with remarkable clearness and accuracy by Judge Butler, in his charge to the jury, — a charge which is given in full in the Appendix to this volume.

<sup>1</sup> *Pitts v. State*, 43 Missis. 472. See also *State v. Scates*, 5 Jones N. C. 420.

<sup>2</sup> Mr. Best distinguishes fictions of law from *presumptiones juris et de jure*, by declaring that the latter are always



*sumtiones Juris*; and *third*, Presumptions of Fact, or Inferences, — *Presumptiones facti, hominis, judicis*.

§ 643. 1. *Irrebuttable Presumptions* (*presumptiones juris et de jure*, sometimes called *presumptiones necessariae*) are those which the law assumes as necessary to its polity, and which it does not allow to be rebutted. Among these may be mentioned the presumptions that every subject knows the law of his country, after it has been duly published; that prior adjudications between the same parties, if duly in court, are so far right as not to be subject to collateral attack; that an infant under seven years is incapable of crime; that an infant under fourteen years is incapable of rape; that a death that does not occur within a year and a day from a specific injury cannot be imputed to that injury;<sup>1</sup> and that a woman uniting with her husband in the commission of an ordinary crime does so under his coercion.

§ 644. 2. *Presumptions of law* (*presumptiones juris*) are presumptions which the law declares to be *prima facie* true; but which (unlike *presumptiones juris et de jure*) may be rebutted by evidence. Among these may be mentioned the presumption of regularity in business transactions (*naturalia negotii*), which transactions, if on their face regular, the law presumes to be free from defects, until the contrary be shown.<sup>2</sup> With this may be mentioned the presumption, *pater est is, quem nuptiae demonstrant*, which may be rebutted by proof of the illegality of the marriage, or that the father was absent during the period in which conception was possible;<sup>3</sup> and the presumption of matrimonial capacity, supposing a marriage is duly proved. In the Anglo-American penal common law, the most prominent of these presumptions is the presumption of innocence; a presumption which the law, as a matter of law, in all cases proclaims, but

true, but the former, "fictions," may be false. But this distinction is unknown to the Roman law, by which the two are frequently treated as convertible; and by which *presumptiones juris et de jure* are, as are fictions, not necessarily true, but simply postulates assumed by the law as necessary for the administration of public justice, and which, as at the foundation of jurisprudence, the law does not permit to be impeached. See Holtzen-

dorff's *Rechtslexicon* (1870), ii. 261. "Ueberhaupt hat die p. de juris et de jure viel Aehnlichkeit mit der Fiction, welcher sie sogar von Einigen gewisser massen gleichgestellt wird." See also Endemann's *Bewelskraft*, 89.

<sup>1</sup> See *supra*, § 15.

<sup>2</sup> Whart. C. L. 7th ed. § 713.

<sup>3</sup> So the Roman law, I. 5, de in jus vocando, II. 4; I. 12, de statu hominum, I. 5; which also permits proof of the husband's impotency.

which may be rebutted by proof of guilt; and the presumption of sanity, which may be rebutted by proof of insanity.

§ 645. 3. *Presumptions of fact* (*presumptiones facti, hominis, judicii*, in the German law *unjuristische Wahrscheinlichkeiten*), which are virtually inferences, based on inductive as distinguished from deductive proof. Among these we may mention the inference of criminal intent or malice drawn from an illegal act; and the inferences of guilt drawn from attempts to escape or evade justice; from suspicious deportment when charged with guilt; from forgery of evidence; from antecedent preparations; from declarations of guilty intentions and threats;<sup>1</sup> and from possession of the fruits of the offence. Presumptions of this class are of fact, and not of law, and are simply logical inductions. The process may be stated as follows: Experience tells us that certain facts, when coexisting, are the results of design; here these facts coexist; therefore they are the result of design. The form is deductive, but the whole strain of the argument is inductive. Both major and minor premisses are inductive processes; and hence are processes of fact as distinguished from law.

Such being the classification of presumptions, they will now, so far as they concern trials for homicide, be examined specifically as follows:—

### III. PRESUMPTION OF INNOCENCE.

§ 646. *General rule is that defendant is to have the benefit of reasonable doubt as to his guilt.*—Every man is presumed to be innocent until the contrary be proved, and if there be reasonable doubt as to his guilt, the jury are to give him the benefit of such doubt. This is a presumption of law (*presumptio juris*), which the law makes arbitrarily in all cases, but which, unlike the *presumptiones juris et de jure*, may be rebutted by evidence. Between civil and criminal cases there is in this respect an important distinction: in the former, the jury weigh the testimony, and after striking a fair balance, decide accordingly; but in criminal cases the testimony must be such as to satisfy the jury beyond a rational doubt, that the prisoner is guilty of the charge alleged against him in the indictment, or it is their duty to ac-

<sup>1</sup> Mill's Logic, vol. i. book 2. See also an article in the Forum for April, 1875.

quit.<sup>1</sup> Such doubt, however, should be actual and substantial, not mere possibility or speculative.<sup>2</sup> "It is not mere possible doubt; because," says Chief Justice Shaw,<sup>3</sup> "everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction to a moral certainty of the charge."<sup>4</sup>

§ 647. *Distinction between "burden of proof" and doctrine of reasonable doubt.* — We frequently hear that after a *prima facie* case on one side the burden of proof is shifted to the other side; and this shifting of the burden of proof, which no doubt takes place after a *prima facie* case, is sometimes confounded with the question of the degree of proof necessary to a verdict. The questions are entirely separate. A defendant may often have the burden of proof imposed on him. But when the case goes to the jury, there is no essential element in his guilt which must not appear to be proved beyond reasonable doubt.<sup>5</sup>

§ 648. No doubt it has been maintained that when the prosecution proves a case of guilt, then the defendant must make out

<sup>1</sup> *Hiller v. State*, 4 Blackf. 552; 131; *R. v. Greenwood*, 23 Up. Can. State v. Thompson, Wright's R. 617; Q. B. 258.

<sup>2</sup> *Sumner v. State*, 5 Blackf. 579; *Emmons v. Stahlnecker*, 1 Jones's Pa. R. 369; *Shultz v. State*, 13 Texas, 401; *Goodwin*, 14 Gray, 55. See *R. v. Jane v. Com.* 2 Metc. (Ky.) 80; *State White*, 4 F. & F. 383.

<sup>3</sup> See also 1 Phillips Ev. 156; 1 Starkie on Ev. 478; 3 Greenl. Ev. § 29; *Pilkinton v. State*, 19 Texas, 214; *Donnelly v. State*, 2 Dutch. (N. J.) 601; *French v. State*, 12 Ind. 670; *James v. State*, 45 Missis. 572; *State v. Ostrander*, 18 Iowa, 435.

<sup>4</sup> See article in Forum for April, 1875, and see *Com. v. Knapp*, 10 Pick. 477; *Com. v. Stow*, 1 Mass. 54, where it is intimated that when a principal's conviction is averred by record, the accessory must show the principal's innocence beyond reasonable doubt; and see *State v. Holme*, 54 Mo. 158; *Kingen v. State*, 45 Ind. 518.

<sup>5</sup> *Com. v. Harman*, 4 Barr, 270; *Pate v. People*, 3 Gilman, 644; U. S. v. Foulke, 6 McLean C. C. R. 349; *Giles v. State*, 6 Georgia, 285; *State v. Schoenwald*, 31 Missouri, 147; *Winter v. State*, 20 Alab. 39; *Com. v. Drum*, 58 Penn. St. 9; *Long v. State*, 38 Ga. 491; *State v. Porter*, 34 Iowa,

his defence beyond a reasonable doubt. But not only is this in conflict with the rule that the doubt which is to prevail is that which exists as to the defendant's guilt on the whole case, but such a limitation would enable the prosecution, at its arbitrary discretion, to exclude the defendant from the benefit of a reasonable doubt as to all the requisites of guilt except the mere act of killing. "Now in a case of this sort," says Bigelow, J., when discussing this point in *Massachusetts*,<sup>1</sup> "if the evidence offered by the government leaves it doubtful whether the injury was the result of accident or design, there can be no question of the right of the defendant to an acquittal, because it is left doubtful whether any criminal act was committed. But can the government, in such a case, on proving simply the injury to the person, rest their case, and call on the defendant to assume the burden of the proof and satisfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by proving part of a transaction, and the burden of proof can be shifted upon the defendant, by a careful management of the case on the part of the government, — so as to withhold that part of the proof which may bear in his favor. But further: the rule of the burden of proof cannot be made to depend upon the order of proof, or upon the particular mode in which the evidence in the case is introduced. It can make no difference, in this respect, whether the evidence comes from one party or the other. In the case supposed, if it is left in doubt, on the whole evidence, whether the act was the result of accident or design, then the criminal charge is left in doubt. Suppose a case where all the testimony comes from the side of the prosecution. The defendant has a right to say that upon the proof, so introduced, no case is made against him, because there is left in doubt one of the essential elements of the offence charged, namely, the wrongful, unjustifiable, unlawful intent. The same rule must apply where the evidence comes from both sides, but relates solely to the original transaction constituting the alleged criminal act, and forming part of the *res gestæ*."<sup>2</sup>

<sup>1</sup> *Com. v. McKie*, 1 Gray, 61.

<sup>2</sup> See also Judge Wells's charge in *Com. v. Sturdevant*, Appendix.

In *Com. v. Andrews* (1868, Pamph. p. 248), Chapman, C. J., thus charged the jury: —

"The burden of proof is always on the government. The law always presumes that any man charged with a crime is innocent; and a jury should consider him innocent until his guilt is proved. The law also presumes that

§ 649. *Proof beyond reasonable doubt must be had as to all facts necessary to make out the case of the prosecution.* — When to support a conviction of guilt certain facts are essential, then a reasonable doubt as to either of these facts should produce the defendant's acquittal.<sup>1</sup>

§ 650. *But otherwise as to defence purely extrinsic to the allegations of the indictment.* — It would seem at the first glance that no defence that touches the question of guilt can be regarded as so far extrinsic to the case as to be excluded from benefit of the principle that reasonable doubt as to any of the conditions essen-

every man's character is good, — that he is honest, peaceable, humane, and kind. The jury should presume this without any proof. Yet, as we know by experience that the fact does not always accord with this presumption, it is satisfactory to know how the fact actually is. If the prisoner proves that the fact is so, it strengthens the presumption of his innocence. It is one of the exigencies in which actual good character comes to his aid. It is hard to believe that one who has always lived a virtuous life, and been kind, peaceable, generous, and humane, and apparently lived in the fear of God, will commit an atrocious crime. Yet this presumption is not conclusive. Human experience teaches us that such men do sometimes fall, with apparent suddenness, into crime of every grade; and a life of external goodness sometimes covers, for years, a base and wicked heart. We cannot see the depths of any man's heart, nor predict with certainty what he may, or may not do, under the influence of temptation. Evidence *may* be strong enough to convict any man of the crime of murder.

"The proof of guilt must be beyond reasonable doubt. The doubt must be reasonable, and not merely captious or speculative. Unreasonable quibbles or cavils often occur to our minds, such as we do not act upon in the

business of life, but they are to be disregarded. The rule is, that the proof must be so satisfactory that you would act upon it in the most important affairs.

"In the first place, the act of killing must be proved beyond a reasonable doubt. There must be proof that the life of the person said to be killed was taken by the prisoner.

"In the next place, the malice aforethought must be proved beyond a reasonable doubt. If the proof stops there, it is murder in the second degree, unless committed with atrocious cruelty, or in the attempt to commit another crime as designated by the statute.

"In the next place, deliberate premeditation must be proved. This makes it murder in the first degree. Malice aforethought makes murder in the second degree; deliberate premeditation added to it makes murder in the first degree."

<sup>1</sup> *Com. v. McKie*, 1 Gray, 61. See *Com. v. Kimball*, 24 Pickering, 366; *Com. v. Dana*, 2 Metc. 340; *R. v. Allen*, 1 Moody C. C. 154. See *Bennett & Heard Lead. Cas.* 356; *West v. State*, 1 Wisc. 209; *Crilley v. State*, 20 Wisc. 209; *Henderson v. State*, 14 Texas, 503; *State v. McCluer*, 5 Nev. 132; and see as to insanity, *infra*, § 665.

tial to the defendant's guilt is to operate in his favor. But, however sound this view may be speculatively, it is contrary to the weight of Anglo-American authority. In cases of illicit sales, it is well settled that if the defendant sets up a license from the government, he must prove such license by preponderating evidence;<sup>1</sup> and this doctrine has been so far amplified as to include all cases in which the defendant relies on the authority of the government for the act complained of, or sets up a former acquittal or conviction.<sup>2</sup>

§ 651. *What defences are so far extrinsic as to require preponderance of proof.*—Here, supposing we accept the last principle, comes the critical inquiry, what is “extrinsic?” or what “confession and avoidance?” Some of the moot questions in this respect will be now noticed.

§ 652. *Alibi.*—It has been said that an *alibi* is so far a confession and avoidance that it must be proved by a preponderance of proof.<sup>3</sup> But an *alibi* not only goes to the essence of guilt, but it traverses one of the material averments of the indictment; that the defendant did then and there kill the deceased. If the prosecution's case leaves a reasonable doubt as to whether the defendant was concerned in the guilty act, it would be agreed on all sides that the defendant should be acquitted. If so, it is hard to understand why such a conclusion should not follow where there is a reasonable doubt as to the physical possibility of the defendant being so concerned.<sup>4</sup>

<sup>1</sup> Whart. C. L. 7th ed. § 708.

<sup>2</sup> See *State v. Morrison*, 3 Dev. 299; *State v. Crowell*, 25 Maine, 171; *Wheat v. State*, 6 Mo. 455; *R. v. Turner*, 5 Maule & Sel. 206; *R. v. Burdett*, 4 Barn. & Ald. 140; *Blatch v. Archer*, Cowper, 66; *R. v. Brannan*, 6 Carr. & Payne, 326; *Smith v. Jeffries*, 9 Price, 257; *Sheldon v. Clark*, 1 Johnson, 513; *U. S. v. Hayward*, 2 Gallison, 485; *Gening v. State*, 1 McCord, 573; *Paley on Convictions*, 45; *Bentley's case*, R. & M. 159; *Farrel v. State*, 32 Alab. 557; *Hopper v. State*, 19 Ark. 143; *contra*, *Mehan v. State*, 7 Wisc. 670; *Com. v. Thurlow*, 24 Pick. 374, qualified in *Com. v. Boyer*, 7 Allen, 306; *People v. Bodine*,

1 Edm. (N. Y.) Sel. Cas. 36; *U. S. v. Hayward*, 2 Gallison, 485. See *Barrett*, in re, 28 Up. Can. Q. B. 561.

<sup>3</sup> *Fife v. Com.* 20 Penn. St. 429; *State v. Vincent*, 24 Iowa, 570; *Walker v. State*, 37 Tex. 367.

<sup>4</sup> *Adams v. State*, 42 Ind. 373; *Binns v. State*, 46 Ind. 311.

At the same time the defence of *alibi*, it must be remembered, is to be carefully scrutinized. Thus Chief Justice Shaw, in the Webster case (*Bemis's ed.* page 469), said:—

“This is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting

§ 658. *Provocation.* — Here, again, we have a defence which goes to negative malice; and which, therefore, in indictments

to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defence is equally available, if satisfactorily established, to avoid the force of position, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defence, it is obvious that all testimony tending to show that the accused was in another place at the time of the offence, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence whatever tends to support the one, tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies."

So Mr. Alison (2 Alison's Criminal Law of Scotland, page 624) says: —

"The defence of *alibi* is of all others the most decisive when duly substantiated; but the evidence adduced in support of it requires to be minutely considered, and the plea is not to be sustained, unless the circumstances were such as to render it impossible that the crime could have been committed.

"One of the most ordinary pleas resorted to by a panel is that of *alibi*; and doubtless when duly qualified and fully proved, it is among the most effectual of any; but it requires to be carefully scrutinized, both as to the sufficiency of the evidence and the inference to be drawn from the facts, if fully proved; because the plea is not conclusive unless the *alibi* is circumstanced and qualified in such a manner as makes it not only unlikely, but impossible, that the panel could

have done the deed at the time and place libelled; the proof of *alibi* is in most cases a direct impeachment of the veracity of the prosecutor's witnesses, which is not to be admitted on light grounds, and because it is a plea of that short and simple sort, with respect to which the panel's witnesses can easily contrive an uniform and false story, such as the prosecutor cannot well disprove, as he can cite no new witnesses in reply. Hume, II. 410, 411; Burnet, 596. Indeed, all the circumstances may be true, and the falsehood lie only in applying them to a different day or hour from that on which they actually occurred, and it is by that contrivance that pleas of *alibi* are in general rendered so difficult to disprove. For these reasons, there is no defence which requires to be so minutely considered, or in which the searching force of able cross-examination is frequently more required."

Again (pages 626-7), he says: —

"In the next place, it is essential that the plea of *alibi* shall be adequately proved. In judging of this matter, the court and the jury have chiefly to consider the character of the witnesses who speak to the fact, the manner in which they give their evidence and the comparative weight due to them, and the witnesses for the prosecution. It is frequently no easy matter, even by the most skilful examination, to detect the falsehood of an *alibi*. By making the witnesses speak to the events which really took place on a particular day, and merely applying them to the day libelled, they are sometimes able to present a story to the jury which hangs remarkably well together in all its parts, and wears all the air of truth, because the events described are true in themselves in

for murder, touches one of the essentials of the prosecution's case. But there is a cardinal distinction between the defence of provo-

relation to each other, and only false when applied to the particular day in question. The only way in which it is possible to expose an artfully got up imposture of this description is by a minute and rapid cross-examination of the witnesses applied to the circumstances previously detailed in evidence by the witnesses for the prosecution, in order to detect falsehood in some inconsiderable and not previously considered particular. Frequently the trick may be exposed by asking the *alibi* witnesses, after they have fully and minutely narrated the events of the day libelled, to give an equally detailed account of the preceding and succeeding days; and their total inability to do that shows that, with reference to that particular day, they must have been practised upon. Of course the weight due to their testimony is increased if they can point out some particular circumstance, as by an examination before the magistrate a few days after, in relation to the matter libelled, or by hearing that the accused was apprehended upon the charge and being thus led to turn what they knew of it over in their own minds, which led to its being fixed in their memory; or if they can exhibit some entry in an account or written document duly proved, and bearing the marks of authenticity which confirms their story as to date or time. But, after all, the jury are frequently reduced to the difficult and painful duty of weighing the testimony on the one side against those on the other; and in doing so, it is their duty, on the one hand, to recollect that the presumption of law as well as of justice is against the prosecutor, and therefore that if the evidence on both sides is equal, or nearly so, they should incline to the

side of mercy; and on the other how much more easy it is to get up a false story of *alibi*, where the whole to be proved is the presence of the prisoner at a particular place at a particular time, than a false account of all the minute particulars relating to so many different matters, which is necessarily implied in the proof of a false charge against a prisoner."

See also Burrill Circumstantial Evidence, page 517.

In *People v. Larned* (7 New York, 448), Judge Mason charged the jury as follows:—

"That the defence interposed by the prisoner was what was in law denominated an *alibi*, and if the *three* witnesses called by him to sustain it had testified truly, the prisoner should be acquitted; that it was however insisted by the prosecution that the defence was a fabricated one and sustained by perjury; that this issue the jury were to determine; that it was undoubtedly true that the defence of an *alibi* is not unfrequently the felon's plea; that when a prisoner finds himself surrounded by facts and circumstances which threaten to overwhelm him and establish his guilt, he not unfrequently resorts to this defence, and seeks to maintain it by perjured witnesses; and that it was the remark of an eminent judge in England that 'in his opinion more perjury had been committed in defences of this description than in all other defences interposed in criminal trials.'"

This is no doubt a proper line of remark in cases where the *alibi* is evidently false. It should be remembered, however, that to an innocent man an *alibi* is almost always an essential defence; and that to throw discredit on *alibis* generally is to throw



cation and that of an *alibi*. If an *alibi* be proved, it destroys the case of the prosecution. We may prove a provocation, however, without necessarily negating malice ; for a man who acts coolly, no matter under what provocation, is guilty of murder, provocation being only a mitigation when the defendant, under its sting, acts in hot blood. In this way we may reconcile decisions apparently conflicting. It is plain that if there be reasonable doubt whether the defendant, in a trial for murder, acted maliciously, he must be acquitted of murder and convicted of manslaughter. But the existence of certain facts, showing provocation, do not necessarily involve this issue. These facts, therefore, may be established by a preponderance of proof.<sup>1</sup>

§ 654. It is by appealing to the same distinction that we may reconcile the decisions of the supreme court of Massachusetts on this interesting issue. It has been expressly laid down by that court that where the defence denies the *existence of the offence*, then, if the jury, on the whole of the facts on both sides, doubts, the doubt is to be given to the prisoner. Yet, after this was accepted as established law, Hubbard, J., charged the jury, on a trial for homicide, in language said to have been drawn up by Shaw, C. J., in answer to the question, "Were the jury instructed by the court that the prisoner was to prove provocation, or mutual combat, and was he to have the benefit of any doubts upon the subject?" as follows: "It is hardly possible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law" (of fact?) "is that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused, and this may appear either from evidence adduced by the prosecution, or evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the *fact upon which the excuse or extenuation depends, according to the preponderance of evidence*. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of

discredit on the most natural proof of innocence.

<sup>1</sup> See *People v. Stonecifer*, 6 Cal. 405 ; *People v. Arnold*, 15 Cal. 476.

proof on one side or the other. But if the case or the evidence should be *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused, that is, in a case like the present, in favor of the lesser offence. *But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance.*" The jury returned a verdict of guilty of murder, and on motion for a new trial, Shaw, C. J., in 1856, delivered the opinion of a majority of the court, sustaining the charge; Wilde, J., dissenting.<sup>1</sup> No doubt the last passage in italics, if taken by itself, would indicate that malice (i. e. the antithesis of hot blood) is to be decided by a preponderance of testimony. But malice is not a fact, in the ordinary sense of the term, but an inference from facts; the facts from which hot blood, as negating malice, is inferred, are to be established by a preponderance of testimony; and so it is stated in the passage last italicized, which must be taken as explaining the passage first italicized. But after such facts are so established, then, if there is a reasonable doubt as to malice, the defendant must be acquitted of murder.

§ 655. In Webster's case, Shaw, C. J., said: "The implication of malice arises in every case of intentional homicide; and the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are in fact circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, *and there are no circumstances disclosed tending to show justification or excuse*, there is nothing to rebut the natural presumption of malice."<sup>2</sup> This simply states that an un rebutted presumption of malice remains in full force. It does not touch the question of conflicting presumptions. The proposition that an abstract killing implies abstract malice is, as will be hereafter seen, purely speculative.<sup>3</sup>

<sup>1</sup> Com. v. York, 9 Metc. 93. See State v. M'Allister, 11 Shepley, 139; this case reported and reviewed in 2 State v. Upham, 38 Maine, 261; Satterwhite v. State, 28 Alab. 65. Benn. & Heard's Lead. Cases, 504.

<sup>2</sup> Com. v. Webster, 5 Cush. 316. <sup>3</sup> Infra, § 664, 669. See Com. v. Hardiman, 9 Gray, 136;

§ 656. In 1855, in the same court, in a case where the deceased was struck down in a fight by the defendant, both being at the time much intoxicated, and where the defendant a few minutes after struck the deceased on the head when he was down, the defendant's counsel proceeded to argue to the court in support of the dissenting opinion of Wilde, J., in York's case, "when he was interrupted by the chief justice, who remarked that the decision of York's case was, that when the killing is proved to have been committed by the defendant, *and nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence." And on this point the chief justice instructed the jury as follows: "The murder charged must be proved; the burden of proof is on the commonwealth to prove the case; all the evidence, on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise they will find the defendant guilty of manslaughter."<sup>1</sup> This may be explained by the distinction above stated, — the *fact* of provocation must be shown by a preponderance of proof: as to the inference of malice, a reasonable doubt must acquit.

§ 657. The general tendency of judicial opinion is to hold the rule above expressed.<sup>2</sup>

§ 658. In New York, in 1866, it was declared by the supreme court that where the fact of homicide is made out, and the defendant sets up justification, the burden is on him to make out this defence beyond reasonable doubt.<sup>3</sup> But in 1870 and 1873, this was expressly overruled, and the law announced to be that the facts of provocation and of necessity must be established by preponderance of testimony, by the rules that obtain in civil actions.<sup>4</sup> That preponderance in such cases is sufficient to decide,

<sup>1</sup> Com. v. Hawkins, 3 Gray, 463. v. Conally, 3 Oregon, 69; State v. See also Com. v. Heath, 11 Gray, Patterson, 45 Vt. 308. 308.

<sup>2</sup> Patterson v. People, 46 Barb. 626.

<sup>3</sup> Tweedy v. State, 5 Iowa (Clarke), 434; State v. Knight, 43 Maine, 11; State v. Bertrand, 3 Oregon, 61; State

<sup>4</sup> People v. Schryver, 3 Hand (42 N. Y.), 1; People v. Stokes, 53 N. Y. 164.

is the inference to be drawn from recent cases in North Carolina<sup>1</sup> and Iowa.<sup>2</sup> In Pennsylvania and Ohio, such is also the law which is now practically recognized.<sup>3</sup> But in neither of these states is it questioned that the jury is to acquit of murder if it has reasonable doubt whether the defendant acted maliciously, and to acquit of both murder and manslaughter if there be reasonable doubt whether the defendant acted voluntarily.<sup>4</sup>

§ 659. *Necessity*.—Are reasonable doubts as to whether the defendant acted voluntarily (*i. e.* not compelled by necessity) to acquit? This depends upon the distinction stated under the

<sup>1</sup> *State v. Willis*, 63 N. C. 26; *State v. Haywood*, Phill. (N. C.) 376.

<sup>2</sup> *State v. Vincent*, 24 Iowa, 570. In 1871, in a prosecution for murder, wherein the plea of self-defence was relied upon, the court, after instructing the jury that if they found that the prisoner killed the deceased in self-defence, they should acquit, further charged: "If, however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defence." It was held that the instruction was erroneous, on the ground that, in effect, it required the defendant to establish, by a preponderance of evidence, that he acted in self-defence, and excluded him from the benefit of an acquittal, if, under the facts shown, there existed a reasonable doubt that his act was wilful. *State v. Porter*, 34 Iowa, 131. "The rule is different when the matter of defence is wholly disconnected from the body of the offence." *Day, J.*, 34 Iowa, 131, citing *Tweedy v. The State*, 5 Iowa, 434, and cases cited; *The State v. Morphy*, 33 *Ibid.* 270; *The State v. Felter*, 32 *Ibid.* 49.

<sup>3</sup> *Com. v. Drum*, 58 Penn. St. R. 9; *O'Mara v. Com.* 75 Penn. St. 424; *Silvus v. State*, 22 Ohio St. 90.

<sup>4</sup> The view of the text is sustained

by *Christiancy, J.*, *Maier v. People*, 10 Mich. 212, as adopted by *Fancher, J.*, *Stokes v. People*, N. Y. Sup. Ct. May, 1873: "To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice premeditated or aforethought. This malice is just as essential an ingredient of the offence as the act which causes the death. Without the concurrence of both the crime cannot exist; and, as every man is presumed to be innocent of the offence of which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offence,—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof as to each rests equally upon the prosecution, though the one may admit and require more proof than the other,—malice in most cases not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done."

In the court of appeals, in June, 1873, in the same case, Judge Rapallo, adopted the same view. See *Stokes v. People*, 53 N. Y. 164.

last head, and is to be solved by the authorities there cited. The fact of compulsion (*e. g.* by superior attack making self-defence necessary, or by command of law) must be proved by a preponderance of evidence. That the defendant acted voluntarily, or wilfully, to use the formal term, must be inferred from the whole case, beyond reasonable doubt.

§ 660. *Presumption of innocence as applicatory to offences embracing two or more degrees.* — Here meets us a subordinate refinement. When, on a prosecution for an offence embracing two or more degrees, if there is reasonable doubt as to which of the two degrees the offence reaches, it is the duty of the jury to acquit of the higher degree and convict of the lower.<sup>1</sup>

§ 661. In Tennessee, in a leading case, the question was brought up by a decision of an inferior court that, when the fact of homicide was made out, and evidence produced in mitigation led the jury to doubt whether the offence was murder or manslaughter, they were bound to find murder. The judgment was reversed, the supreme court holding, — “The judge should have told the jury, that if, upon the whole circumstances of the case, they were satisfied of his (the prisoner’s) guilt, they ought to find him guilty; but if their minds, taking all the evidence together, could not come to any satisfactory conclusion, as to whether the act amounted to murder or manslaughter, they ought to find him guilty of manslaughter only.”<sup>2</sup>

§ 662. The same rule applies where there is a reasonable doubt as to the specific intention to take life. In such case, there must be an acquittal of murder in the first degree; though, if a malicious homicide be proved, a conviction of murder in the second degree would on the evidence be sustained.<sup>3</sup>

§ 663. In Ohio, Judge Wright went so far as to say that where, as in cases of homicide, the legislature had created degrees of guilt, the doctrine of doubts did not apply to any but the higher grades.<sup>4</sup> It cannot be doubted, however, that, in

<sup>1</sup> Mitchell v. State, 5 Yerger, 340; Witt v. State, 6 Cold. (Tenn.) 5; Davis v. State, 10 Georgia, 101; State v. Turner, Wright, 29; State v. Lallyer, 4 Minne. 368; Hamby v. State, 26 Tex. 523; Com. v. Hill, 2 Gratt. 594; People v. Milgate, 5 Cal. 127; Com. v. Drum, 58 Penn. St. R. 9;

Staup v. Com. 74 Penn. St. 458; O’Mara v. Com. 75 Penn. St. 424.

<sup>2</sup> State v. Coffee, 3 Yerger, 288;

Dove v. State, 3 Heisk. 348.

<sup>3</sup> See supra, § 34, 194.

<sup>4</sup> State v. Turner, Wright, 29.

making such a distinction, the learned judge was in error. Doubts as to a defendant's guilt are to weigh in his favor, because the law presumes him innocent until he is shown to be guilty ; and if such a presumption exists at all, it exists in every case alike.<sup>1</sup> The question, in fact, stands simply as follows : If, on an indictment for an offence containing several grades, the jury have reasonable doubts as to the higher grade, they must acquit of the higher grade ; and so if they have reasonable doubts as to the lower grade, they must acquit of the lower grade. They can convict of no grade whatever, if they have reasonable doubt as to the defendant's guilt of such grade.

§ 664. No doubt it is sometimes said that from an abstract killing with a deadly weapon, only murder in the second degree can be inferred. But in truth, as is elsewhere shown, no such case as that of "A. killing B. with a deadly weapon," viewing it simply in this meagre outline, ever arose, or can arise, in a court of justice.<sup>2</sup> In the first place, we at least know what kind of weapon it was that was used. Was it poison ? Undoubtedly if poisoning be malicious, we cannot withdraw the case from the category of murder in the first degree. But are not poisonous drugs frequently administered without malicious intent ? Are not most medicines more or less poisonous ? Hence if we say, "Whoever deliberately administers poison acts maliciously," we state an untruth. If we say, "Whoever maliciously administers poison acts maliciously," this is a *petitio principii*. But in practical jurisprudence we are presented with no such alternative. We generally know what kind of poison is administered. We almost always know whether it was administered openly or stealthily ; and there is no case that comes up for trial in which there is not a group of other circumstances each adding a new qualifying power to the reasoning by which the case is to be ruled. So it is with all other modes of killing ; and hence we must conclude that the question whether an abstract killing with a deadly weapon is murder in the first or murder in the second degree is one which does not belong to practical jurisprudence, and the presentation of which to a jury can only mislead. No case can arise in which there is not some distinctive incident capable of either strengthening or weakening the proof of ma-

<sup>1</sup> Wasden v. State, 18 Geo. 264.

<sup>2</sup> See *infra*, § 669.

licious intent. When facts exist which are consistent only with the hypothesis of murder in the first degree, then murder in the first degree is to be inferred. When facts exist which are consistent only with the hypothesis of murder in the second degree, then murder in the second degree is to be inferred. One point of law, however, may be detached from the inferences of probable reasoning, and that is that *when there are doubts as to whether a case falls within a higher or a lower grade, the jury, as a matter of law, are to incline to the merciful side, and find for the lower grade.* This is probably all that was meant to be enunciated by the cases just cited.<sup>1</sup>

#### IV. PRESUMPTION OF SANITY.

§ 665. By the common law, every man is presumed to be sane until the contrary be proved; and the better opinion is, that when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof.<sup>2</sup>

Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity.

§ 666. The first is, that insanity, as a defence of confession and avoidance, must be proved beyond reasonable doubt; and that, unless this be done, the jury, the case of the prosecution being otherwise proved, are to convict. This is expressed by Hornblower, C. J., as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of

<sup>1</sup> *Floyd v. State*, 3 Heisk. 342. To this effect see also *Mitchell v. State*, 5 Yerg. 340; *Davis v. State*, 10 Ga. 101; *People v. Milgate*, 5 Cal. 127; *Mo-Daniel v. State*, 8 S. & M. 401; *State v. Hildreth*, 8 Ired. 429; *Pierson v. State*, 12 Ala. 149; *State v. Holme*, 54 Mo. 153. The same rule is taken in respect to murder and manslaughter. If the case is one of the two, and doubts exist as to the murder, the law presumes in favor of the milder grade. *Com. v. York*, 9 Metc. 93.

<sup>2</sup> *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 4 Cox C. C. 155; *U. S. v. Lawrence*, 4 Cranch C. C. 514; *Atty. Gen. v. Parnter*, 3 Brown C. C. 441; *U. S. v. McGlue*, 1 Curtis, 1; *State v. Spencer*, 1 Zabriskie, 202; *State v. Brandon*, 8 Jones N. C. 468; *State v. Starke*, 1 Strobhart, 479; *State v. Brinyea*, 5 Ala. 244; *People v. Myers*, 20 Cal. 518; *Boswell v. Com.* 20 Grattan, 860; *Com. v. Eddy*, 7 Gray, 583; *Loeffner v. State*, 10 Ohio, 599; *R. v. Layton*, 4 Cox C. C. 149.

committing the act ought to be to find a sane man guilty.”<sup>1</sup> Such is the English rule.<sup>2</sup>

The second is, that (at least to find an affirmative verdict of lunacy) the jury are to be governed by the *preponderance* of evidence; and are not to require insanity to be made out beyond reasonable doubt.<sup>3</sup> This view has been expressed in Maine;<sup>4</sup> in Massachusetts;<sup>5</sup> in New York;<sup>6</sup> in Ohio;<sup>7</sup> in North

<sup>1</sup> *State v. Spencer*, 1 Zabriskie, 202; See, as countenancing this view, *Clark v. State*, 12 Ohio, 495; *Bonfante v. State*, 2 Minn. 123.

<sup>2</sup> 1 W. & St. Med. J. § 225, 226; *McNaghten's case*, 10 C. & F. 200; *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 3 Cox C. C. 155; *R. v. Layton*, 4 Cox C. C. 149.

<sup>3</sup> See *Com. v. Eddy*, 7 Gray, 583; *Com. v. Rogers*, 7 Metc. 500; *Loeffner v. State*, 10 Ohio, 599.

<sup>4</sup> *State v. Lawrence*, 57 Me. 574 (1870).

<sup>5</sup> *Com. v. Eddy*, 7 Gray, 183; *Com. v. Rogers*, 7 Metc. 500; *Com. v. Heath*, 11 Gray, 303. See, however, *Com. v. Pomeroy*, in Appendix, where the older doctrine is much and justly modified.

<sup>6</sup> *Ferris v. People*, 35 N. Y. 125; *Walter v. People*, 32 N. Y. 147. In *Flanagan v. People*, 52 N. Y. 467 (1873), *Andrews J.*, giving the opinion of the court of appeals, said:—

“In *People v. McCann* (16 N. Y. 58) it was held that it was error to charge the jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt to entitle him to an acquittal. This was the extent of the decision. The question was not in the case, whether the prisoner would be entitled to the benefit of a doubt upon the evidence introduced by him to establish the defence. What is said by the learned judges upon that subject is entitled to such weight as their character and

learning and their arguments entitle it to. See *People v. Schryver*, 42 N. Y. 1.

“It is not necessary for us to consider the question in this case; but we prefer to leave it precisely where the cases cited leave it, an open question, so far as judicial authority in this state is concerned.”

*Mr. H. L. Clinton*, in his argument before the Senate Judiciary Committee of New York, on April 15, 1873, says: “A great deal of confusion has been created with respect to the degree of proof necessary to establish the defence of insanity in criminal cases, by reason of the language used by Judge Brown in the case of *McCann*. I think that case has been greatly misunderstood, and that a construction has been put upon it never intended by the court of appeals. I propose to show precisely what was decided in that case.

“In the case of the *People v. McCann*, 16 N. Y. 58, the judge, on the trial atoyer and terminer, charged the jury that, ‘as sanity is the normal state, there is no presumption of insanity, and the defence must be proved beyond a reasonable doubt.’ It was held that this portion of the charge was erroneous, and a new trial was therefore granted. Two opinions were delivered, one by Judge Bowen and another by Judge Brown.

“Judge Bowen rests his opinion on the ground that the defence of insanity

<sup>7</sup> *Loeffner v. State*, 10 Ohio, 599.



Carolina;<sup>1</sup> in Missouri, it being there now held, that "preponderance," but not "*clear* preponderance," is required;<sup>2</sup> in California;<sup>3</sup> in Iowa;<sup>4</sup> in Arkansas;<sup>5</sup> and in Pennsylvania.<sup>6</sup>

in criminal cases must be proved the same as in civil cases; that is, that the preponderance of evidence must be in its favor. The party having the affirmative, in all civil cases, must prove it by a preponderance of evidence. If the evidence be equally balanced, there being no preponderance on the one side or the other, the decision should be against the party having the affirmative.

"That Judge Bowen based his decision in the McCann case upon the ground that, although it was not necessary for the defendant to prove insanity in a criminal case 'beyond a reasonable doubt,' yet, that it was necessary for him to establish it by a preponderance of evidence, as in civil cases, is clear, as will appear by the following extract from his opinion, page 62:—

"It is a general rule, applicable to all criminal trials, that to warrant a conviction the evidence should satisfy the jury of the defendant's guilt beyond a reasonable doubt; and it has been held that there is a distinction in this respect between civil and criminal cases. The rule is based upon

the presumption of innocence, which always exists in favor of every individual charged with the commission of a crime. It is also a rule, well established by authority, that where in a criminal case insanity is set up as a defence, the burden of proving the defence is with the defendant, as the law presumes every man to be sane. But I apprehend that the same evidence will establish the defence which would prove insanity in a civil case. The rule requiring the evidence to satisfy the jury beyond a reasonable doubt is one in favor of the individual on trial charged with crime, and is applicable only to the general conclusion, from the whole evidence, of guilty or not guilty."

"Although Judge Brown arrives at the same conclusion as Judge Bowen, that the charge of the court below was erroneous, he expresses an opinion entirely different from Judge Bowen in respect to the proof necessary to establish insanity in criminal cases. At page 65 Judge Brown says: 'It certainly is true that sanity is the normal condition of the human mind, and in dealing with acts, criminal or other-

<sup>1</sup> *State v. Starling*, 6 Jones N. C. 366; *State v. Brandon*, 8 Jones N. C. 468.

<sup>2</sup> *State v. Hundley*, 46 Mo. 414 (1870), somewhat qualifying *State v. Klingler*, 43 Mo. 127. But in *State v. Smith*, 58 Mo. 267, the tendency of the argument of the court is to require sanity to be proved beyond reasonable doubt. "Insanity is a simple question of fact, to be proved like any other fact, and any evidence, which reasonably satisfies the jury that the

accused was insane at the time the act was committed, should be deemed sufficient." *Vories, J., State v. Smith*, 58 Mo. 270, citing *State v. Hundley*, 46 Mo. 414; *State v. Klingler*, 43 Mo. 127; *State v. McCoy*, 34 Mo. 531.

<sup>3</sup> *People v. Coffman*, 24 Cal. 230.

<sup>4</sup> *State v. Felter*, 32 Iowa, 50.

<sup>5</sup> *McKenzie v. State*, 26 Ark. 334.

<sup>6</sup> *Lynch v. Com.*, cited in *Com. v. Ortwein*, Sup. Ct. Penn. Jan. 1875, reported in *Western L. J. March*, 1875.

§ 667. A third view is, that in such an issue the *prosecution* must prove *sanity* beyond reasonable doubt. Thus, in a case in

wise, there can be no presumption of insanity.' At page 68 Judge Brown says:—

"The law presumes malice from the mere act of killing, because the natural and probable consequences of any deliberate act are presumed to have been intended by the author. But if the proof leaves it in doubt whether the act was intentional or accidental, if the scales are so evenly balanced that the jury cannot safely determine the question, shall not the prisoner have the benefit of the doubt? And if he is entitled to the benefit of the doubt in regard to the malicious intent, shall he not be entitled to the same benefit upon the question of his sanity, his understanding? For if he was without reason and understanding at the time, the act was not his, and he is no more responsible for it than he would be for the act of another man.'

"Judge Brown means to say that if the scales are evenly poised as to sanity or insanity, then a reasonable doubt is created, and the jury should find in favor of insanity. All that the court of appeals did or could decide was, that the judge at the trial was wrong in charging that insanity must be proved beyond a reasonable doubt. According to this charge, it would not be sufficient to prove insanity by a preponderance of evidence. Had the judge below charged the jury that in order to establish the defence of insanity, the evidence must preponderate in its favor, he would have charged the law as it always existed.

"If the language of Judge Brown were correct, it would be necessary in all cases of murder for the prosecution to prove that, beyond a reasonable doubt, the prisoner was sane at the

time of the homicide. Judge Brown, in his opinion, page 68, lays stress upon the definition of murder as given by Sir Edward Coke. 3 Inst. 47:—

"When a person of 'sound memory' and discrimination unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied.'

"Judge Brown proceeds to argue in his opinion, that it is necessary for the prosecution to prove all 'the constituents of the crime,' and among them, that the prisoner was 'of sound memory and discrimination.'

"That such is not the law has been distinctly and emphatically held by the court of appeals in the subsequent cases. In *Walter v. The People*, 32 N. Y. 141, Wright, J., in delivering the opinion of the court, page 164, says:—

"The prisoner's counsel requested the judge to charge, as a proposition of law, that in a case where the defence consists in the insanity of the prisoner, it becomes incumbent upon the prosecution to prove him sane. . . . As an abstract legal proposition it was manifestly unsound. Sanity is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecution to give affirmative evidence that such state exists in a particular case.'

"In the case of *Ferris v. The People*, 35 N. Y. 125, Davies, C. J., in delivering the opinion of the court at page 129, quotes with approbation the extract above cited from Judge Wright's opinion.

"The whole difficulty in the *McCann* case arose from the fact, that the judge atoyer and terminer failed to lay down correctly the rule of evi-

Michigan, in 1869, while it was admitted that sanity was the normal condition of the mind, and that the prosecution might rest

dence. He should have charged the jury upon the subject of insanity as follows:—

“1. That the law presumes sanity and not insanity. 2. That the party who interposes insanity as a defence must prove it. 3. That the party setting up this defence has the affirmative, and must prove it by a preponderance of evidence. The doctrine as to a reasonable doubt had nothing to do with proving insanity. Judge Bowen, in McCann’s case, 18 N. Y. 62, correctly said:—

“‘The rule requiring the evidence to satisfy the jury beyond a reasonable doubt is one in favor of the individual on trial charged with crime, and is applicable only to the general conclusion, from the whole evidence of guilty or not guilty.’

“The distinction between the proof necessary, in civil and criminal cases, is well stated in 3 Greenleaf’s Ev. § 29:—

“‘A distinction is to be noted between civil and criminal cases, in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases, their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law, that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full

belief of the fact, to be the exclusion of all reasonable doubt. . . .

For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence.’

“This is the doctrine laid down by Judge Bowen in the McCann case. As this has always been the law, and as no judge as a member of a court sitting *in banc* in any reported case ever expressed any contrary doctrine, it is to be presumed that the court of appeals in the McCann case did not overrule the elementary principle above cited from Greenleaf. All that Judge Brown said, to the effect that if any reasonable doubt exists as to whether insanity is proved in a criminal case, the jury should give the doubt in favor of the prisoner, was *obiter*. No such point was before the court.

“The views I have expressed in regard to what was decided in the case of the People v. McCann, are fully sustained by a recent decision of the court of appeals. In the case of the People v. Schryver, 42 N. Y. 1, it was held that in a case of homicide it was sufficient for the prosecution to prove that the deceased was killed by the prisoner. The court distinctly held, that where the prosecution had proved this, the *corpus delicti* was established; a case was made out against the prisoner, who, if he had any defence,—for example, justification, self-defence,—he must prove it by affirmative testimony. The court below in this case fell into the same error in charging the jury as in the People v. McCann, that the prisoner must prove his affirmative defence ‘beyond a reasonable doubt.’ The court of appeals held that this was error. They placed their decision upon the distinct ground, that

upon the presumption that the accused was sane when he committed the act, until it is overcome by the opposite case, it was nevertheless determined, that, when any evidence which tends to overthrow that presumption is given, the jury are to examine, weigh, and pass upon it, with the understanding that, although the initiative in presenting the evidence is taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of the guilt.<sup>1</sup>

Similar views have been maintained by other American courts; and it has been not infrequently ruled, that where there is reasonable doubt as to sanity, the jury must acquit.<sup>2</sup>

in a criminal case a defendant must prove any affirmative defence, such as self-defence or insanity, by a preponderance of testimony. Earle, Ch. J., in delivering the opinion of the court (p. 8), refers to the case of McCann, as follows :—

“‘In the case of the *People v. McCann*, 16 N. Y. 58, the presiding justice at the trial charged the jury that the prisoner was bound to prove his defence of insanity “beyond a reasonable doubt.” Whether this charge was correct or not was the only question for the consideration of the court of appeals, and it was held to be incorrect, and the judgment was reversed. Two opinions were written: Judge Bowen held that it was enough for the prisoner to establish this defence, as insanity would be proved in a civil case, by a preponderance of evidence; Judge Brown held, that while the law presumed every man to be sane, when the prisoner introduced evidence to show his insanity, the burden devolved upon the *People* to prove his sanity, like any other material fact in the case, beyond a reasonable doubt. It does not appear that the court concurred in this view. It was sufficient for the court to hold that the charge was too unfavorable to the prisoner. Before Judge Brown’s opinion shall be taken

as the settled law, the question will need further consideration, as it does not seem to be supported by the current of authorities.’

“Thus it will be perceived that whenever insanity is interposed, it must be proven; that it is not sufficient to get up a doubt upon the subject, but it must be established by a preponderance of evidence; otherwise the testimony goes for nothing.”

<sup>1</sup> *People v. Garbutt*, 17 Mich. 9.

<sup>2</sup> *State v. Bartlett*, 43 N. H. 224; *Hopps v. People*, 31 Ill. 385, qualifying *Fisher v. People*, 23 Ill. 283; *Chase v. People*, 40 Ill. 224; *Ogletree v. State*, 28 Ala. N. S. 701; *State v. Crawford*, 11 Kans. 32; *Dove v. State*, 8 Heisk. 348, cited *infra*; *Smith v. Com.* 1 Duvall (Ky.), 224, though in a subsequent case this was qualified by saying that a mere doubt was not enough; the doubt must be truly reasonable. *Kriel v. Com.* 5 Bush, 362. See also *Polk v. State*, 19 Ind. 170; *State v. Marler*, 2 Ala. 43; *People v. McCann*, 16 N. Y. 58. (The meaning of the latter case is examined in Mr. H. L. Clinton’s argument in the N. Y. Senate, April 15, 1873, as quoted *supra*.) *Bradley v. State*, 31 Ind. 492; *Stevens v. State*, 31 Ind. 485; *State v. Jones*, 50 N. H. 370; and see a learned note in *Am. Law Reg.* for Jan. 1875, p. 25.

§ 668. The conflict which has been just noticed has arisen from the habit of viewing the plea of insanity as an ordinary defence of the nature of confession and avoidance. Such, however, is not the case. It is rather in the nature of a plea to the jurisdiction, or a motion to change the venue. The defendant, through his counsel and friends, comes in and says that he is not amenable to penal jurisdiction. He is not a moral agent; he is *insane*; he is not the object of penal discipline. Such a plea, as is elsewhere argued,<sup>1</sup> may be regarded, when it is set up for the purpose of showing entire unamenability to penal process, as a purely extrinsic application, to be made out by a preponderance of proof. Otherwise the law approaches those charged with crime as a wolf in sheep's clothing. To hold that a reasonable doubt as to a defendant's sanity should require his permanent imprisonment as a dangerous lunatic, would be to turn a maxim, apparently benignant, into an instrument of gross oppression. A man is tried for an assault. The jury have a reasonable doubt of his sanity, and find him, under the statutes, a dangerous lunatic; and this is a necessary consequence of the doctrine here criticised. Yet from such a consequence we revolt. To extinguish a man's civil existence, — to place him under close confinement for life, — to deprive him of the control of his estate, and of access to his family, something more than reasonable doubt should be required. For so total an extinction, not only of liberty but of civil and social capacity, we should at least exact a preponderance of proof. The difficulty is attributable to the fact that most cases in which insanity comes up as a defence are those of murder; and to be decreed to be *civiler mortuus*, and to be imprisoned as a dangerous lunatic, is better than to be hung. But the principle we are here discussing applies to all criminal prosecutions; and if a reasonable doubt as to sanity requires a verdict of dangerous lunacy, under the statutes, in a homicide case, it requires such a verdict in a case of assault. If in the former case the court must instruct the jury to give a verdict of dangerous lunacy if they have a reasonable doubt, the same instruction must be given in the latter case.

But supposing insanity is set up, not for the purpose of transferring the defendant to the category of non-responsible agents,

<sup>1</sup> See Whart. Cr. Law, 7th ed. § 54.

but for the purpose of meeting the allegation of malice in the indictment, does the same rule apply? Supposing, in other words, the defence is, — “ We do not say that the defendant is a maniac, or an idiot, who is to be put in custody as permanently and dangerously insane, and is to have his civil existence terminated ; but we say that he is predisposed to insanity, and that when excited his reason is so swept away by the current of this insane tendency, that he is incapable of deliberate intent.” Are we here to concede that reasonable doubt as to the defendant’s capacity in this respect is to acquit ; or must we here also, in order to acquit, require that such incapacity should be made out by a preponderance of proof? Falling back on the reasoning heretofore expressed,<sup>1</sup> we must hold that when a defendant is charged with a deliberate homicide, and he offers evidence to show that the condition of his mind was such (by reason of insane predisposition) that he was incapable at the time of deliberation, then, if the jury has a reasonable doubt as to such capacity, he is to be acquitted of the higher grade and convicted of the lower grade of the offence. And this is conceded even by those courts who hold that on the question of insanity, as an absolute bar, there must be a preponderance of proof.<sup>2</sup> Indeed, when we examine the reasoning of the courts of Pennsylvania and Massachusetts in the group of cases which relate to the question of reasonable doubt, we find that the distinction here expressed lies at the basis of their adjudications. To find a defendant irresponsible requires a preponderance of proof. But whenever there are various grades in an offence, then a reasonable doubt as to whether the higher grade exists requires a finding for the lower grade. And whenever intent is a necessary constituent of the offence, then a reasonable doubt as to intent requires an acquittal. If there be a logical inconsistency in the views just expressed, such inconsistency must be defended by an appeal to the maxim *in dubio mitius*.<sup>3</sup> If, on an indictment for an assault, insanity is suspected by the jury, and if a verdict

<sup>1</sup> Supra, § 584.

<sup>2</sup> Supra, § 34, 194, 660. The observations in Wharton’s Cr. Law, 7th ed. § 55 *d*, I desire to recall so far as they are inconsistent with those given in the text.

<sup>3</sup> This is emphatically affirmed in the Roman law. “ In poenalibus causis benignius interpretandum est.” L. 155. § 2. D. 50. 17.

of insanity would subject the defendant to far more rigorous penalties than a conviction of assault, then there can be no verdict of insanity, simply because of a reasonable doubt of sanity. On the other hand, on an indictment for murder, where a conviction would impose severer penalties than a verdict of insanity, doubts must tell in favor of the more benignant application of the law.

V. PRESUMPTION OF INTENT. ABSTRACT MALICE NOT TO BE INFERRED FROM ABSTRACT KILLING.

§ 669. In several of the opinions which have just been cited occurs the expression that when the mere act of killing is proved, without anything more, malice is to be presumed. This, however, is an axiom handed down to us from the scholastic jurisprudence, and has no application to any case that can arise in a court for the trial of real issues. For no such thing as a mere abstract killing of B. by A. can be proved. A statement by a witness, could we imagine such evidence to be offered, that "A. killed B.," would be inadmissible as mere matter of opinion; it would be necessary to state the facts so as to show that the way of killing was one of which the law takes cognizance. It may be said, for instance, that A., a son, killed his mother by his misconduct breaking her heart; but this would not be the object of a criminal prosecution. What the law punishes, is not *killing*, but *particular modes of killing*, and those must be averred and proved. Now these modes, when proved, form facts from which intent is to be inferred or negatived. It is therefore announcing a proposition purely speculative and irrelevant to tell a jury that an abstract killing involves, as a matter of law, an abstract intent. It is perfectly proper, however, to tell a jury that from certain circumstances — *e. g.* a deadly weapon, repeated and dangerous wounds, threats — intent and malice may be rightly inferred as inferences of fact. These are inferences familiar in the operation of psychological and social law; inferences the jury are bound to weigh; but in weighing which it is proper that they should be advised by the court. When we apply this test, the apparent conflict between the opinions of American courts vanishes. It is true that we hear occasional utterances, as in Massachusetts, of the old doctrine, that malice is to be presumed from the mere act of killing; but wherever this is done, it is followed by the admission that when the facts of killing are proved, then

the malice is to be inferred from the facts. Now as the facts of killing are always proved, the idea of abstract malice being presumed from abstract killing has no application to the cases before the court.<sup>1</sup> It is a speculation like the speculations of the old Schoolmen, from which it is taken, based on the supposition that there are abstract generic phenomena (*e. g.* an abstract horse with abstract predicates); speculations which roam over all creation, without possibly touching any particular real case. Should, however, the judge make the proposition not speculative, but regulative, — should he direct the jury to discard all the facts of the case, and to infer malice as a presumption of law from the act of killing, — this is error.<sup>2</sup>

<sup>1</sup> See this virtually admitted in *Com. v. Hawkins*, 3 Gray, 468, by Shaw, C. J., and by Curtis, J., in *U. S. v. Armstrong*, 2 Curtis C. C. 446.

<sup>2</sup> See *supra*, § 664. In *U. S. v. McClare*, 17 Bost. Law Rep. 489, the case consisted simply of proof of a blow struck. "The mere fact," say the court, "of a blow struck does not make out a crime. In charging a crime, the government charges a criminal intent, and must prove it. Proving a blow may in some cases be sufficient evidence of a criminal intent, but such intent may be repelled by the circumstances. If on all the evidence the jury are left in reasonable doubt as to the intent of the defendant, they cannot convict him of the crime." To same effect see *Kingen v. State*, 45 Ind. 518; and cases cited *infra*, § 671.

"There are cases, where the conclusion is drawn from known relations and coincidences of a physical character. But there are those of a moral nature, from which conclusions may as legitimately be drawn. The ordinary feelings, passions, and propensities under which parties act are facts known by observation and experience; and they are so uniform in their operation, that a conclusion may be safely drawn, that if a person acts in a particular

manner he does it under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes which consist not merely in an act done, but in the motive and intent with which they are done. But this intent is a secret of the heart, which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred, and often is safely inferred, from his conduct and external acts." Shaw, C. J., *Bemis's Webster case*, 463.

"What, then, is the matter of fact proved, under the name of the existence of a motive? It is either the actual excitation of this or that desire by this or that assignable cause; or else the existence of this or that object, in a state in which it will naturally, in the breast of the party in question, have had the effect of exciting this or that desire. Man in general is susceptible of enmity: the desire of witnessing pain on the part of the individual who is the object of it. Man in general is susceptible of sexual desire. No human bosom that does not harbor within itself the love, the desire, of the mat-



## VI. NO DEFENCE THAT THE DEFENDANT HAD OTHER INTENTS.

§ 670. It need scarcely be said that when a deliberate and unauthorized homicide is committed, it is no defence that the

ter of wealth. Thus much is what everybody is sufficiently persuaded of; thus much is what nobody ever thinks of proving. But Clodius had become the object of enmity to Milo; in the bosom of Tarquinius the appetite of sexual desire had attached itself upon the idea of Lucretia with particular force; upon the death of Amerinus, property to a considerable amount was secured to Haeres; of that state of things Haeres could not be unconscious, and had been heard to speak of it with impatience. These are facts which admit of proof, and may well appear to call for it. But, in the case of the happening of the correspondent obnoxious event in question, and a suspicion pointing to Milo, Tarquinius, or Haeres, respectively, as the criminal author of that event; to prove the existence of these respective facts is to prove, on the part of these persons respectively, the existence of the appropriate motive.

"Thus it is that the consideration of any object pointed to as capable of having operated, in the case in question, with an adequate degree of seductive force, acts in relation to the supposed offence, not so much in the character of a directly probablizing consideration, as in that of a consideration tending to repel the force of improbability (psychological improbability) acting in the character and direction of a disprobablizing circumstance. On no occasion (says the defendant) does man ever act without a motive. Admitted (replies the prosecutor), but here, then, was your motive; such or such may have been the desire excited in your breast. Thus or thus was it, or might it have been

gratified by the event, of which, from all the evidence taken together, your act, your criminal act, is concluded to have been the cause. Against this disprobablizing circumstance, — psychological improbability, — the existence of a motive, if proved, may have considerable weight. It may even destroy the force of the disprobablizing circumstance altogether. Considered in itself, the criminative force of the circumstance consisting in the motive (consisting in this, viz. that the situation in which the supposed delinquent is, is such as subjects him to the action of the motive in question), amounts to nothing. In the natural course of things, where there is any property, every child has something to gain by the death of a parent. But, upon the death of a father, no one is ever led by any such consideration to look to an act of parricide, in the first instance, as the most probable cause of the death.

"Not being properly a criminative circumstance, no counter-probabilities seem applicable to it in the character of infirmative considerations.

"The following cases may serve as instances where, in the way above explained, the motive (viz. the exterior motive) became, and with propriety, an object of consideration, in the character of a criminative circumstance.

"Anno 1781. — Donnellan's case at Warwick assizes. Offence, murder of his wife's brother. Motive, prospect of succession to his property.

"Anno 1803. — Fern's case at Surrey assizes. Offence, incendiarism. Motive, profit by over-insurance.

"Anno 1803. — Robert Wilson's case at Edinburgh. Offence, murder

defendant had other objects in view beside killing the deceased.<sup>1</sup> The general principle of law is, that if among all the motives leading to a particular intentional illegal act, one motive is to violate the law, this is sufficient to lend to the act the essential evil intent, no matter how strong may be other concurrent intents.<sup>2</sup> Thus intending ultimate public good is no defence to an indictment for nuisance ;<sup>3</sup> intending to return the goods, no defence to an indictment for embezzlement ;<sup>4</sup> intending to return lost goods on a reward, no defence to an indictment for larceny ;<sup>5</sup> intending to rid the community of a bad man, no defence to an indictment for homicide.<sup>6</sup> No matter what other intents existed, if the intent to do the particular unlawful act is either proved or implied, the offence, if committed, is complete. If the law were otherwise, there would be few convictions of crime, for there are few crimes in which extraneous motives are not mixed up with the particular evil intent.<sup>7</sup>

of his wife. Motive, paving the way to a more agreeable connection with another woman.

"Anno 1753. — Mary Blandy's case at the Oxford assizes. Offence, the murder of her father by a long course of poison. The property of the father was considerable ; she was an only child ; it would fall to her of course. But where parricide is the offence, is it in the nature of money to constitute a seducing motive ? At that rate, parricide, instead of being as rare as it is horrible, would be among the most frequent of offences. She was enamoured of the wretched Cranston, her seducer, and the existence of the fondest of parents presented itself as an obstacle to a union which, had she known all, she would have known could not be legalized. What the force of steam is in the physical world, the force of love is in the psychological ; capable, when under pressure, of opposing the strongest force. The existence of such pressure is among the most common of all family incidents ; the attempt to surmount

it by such flagitious means, happily among the most rare. But to bring this motive to view required no separate evidence. The same evidence which showed from what source she had received the poison, showed by what motive she had been led to administer it.

"Theophrastus is accused of theft. Fortune, opulent ; reputation, unspotted ; disposition, generous. The object of small value. Delinquency assumed ; what could have been his motive ? It was a black-letter book ; a cockle-shell ; a butterfly. Theophrastus was a collector." Bentham's *Rat. Jud. Ev.* iii. 186 *et seq.*

<sup>1</sup> See this considered *supra*, § 19-25.

<sup>2</sup> See Whart. C. L. 7th ed. § 635 *f*, and cases there cited.

<sup>3</sup> Whart. C. L. 7th ed. § 2368, 2372.

<sup>4</sup> Whart. C. L. 7th ed. § 1935-42.

<sup>5</sup> Whart. C. L. 7th ed. § 1796.

<sup>6</sup> Whart. C. L. 7th ed. § 1023-27.

<sup>7</sup> See Whart. C. L. 7th ed. § 392. See especially remarks on motive in 1 Wh. & St. Med. J. § 399-405.

As we have already observed,<sup>1</sup> when there is an intent to kill, and an unintended homicide ensues, the collateral wrong intent may be tacked to the unintended wrong, so as to complete the contemplated crime. A man, for instance, out of general malignity, may fire on a crowd, or may displace a rail on a railway; and then, if any life be lost, he is responsible for murder, though he may have had no intention of taking any particular life.<sup>2</sup>

So also is it with regard to the transfer of particular evil intents. Thus, if a man shoots A., when intending to shoot B., he is responsible for shooting A., under statutes which make it penal to shoot at another with *intent to kill the person shot at*.<sup>3</sup> And so is it with regard to murder at common law. A man who, designing to poison A., poisons B., is guilty of poisoning B. Yet, as has been fully shown,<sup>4</sup> there must be in such a case an intent to kill, and this intent must be followed immediately (though it may be under an entire mistake of facts) by killing. An intent to commit an offence other than killing cannot rightfully be put in evidence to prove an intent to kill.

§ 670 a. *Motive need not be proportionate to heinousness of crime.*

— It is sometimes argued, “Is it likely that one man should kill another for so small an article? Are we not to infer, when there is a homicide which is followed by the stealing of a mere trifle, that the homicide was the result of sudden passion, rather than *lucri causa*? Or for a mere prejudice or spite is it likely that one man would assassinate another, and thus expose himself to the gallows?” No doubt when a tender mother kills a child, or a friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure or insanity from the motivelessness of the act. But we have no right to make such inference because the motive is disproportionate. We are all of us apt to act on very inadequate motives; and the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his passions, and unregulated by religious or moral sense, exaggerates an affront, or nourishes a suspicion, until he deter-

<sup>1</sup> Supra, § 421.

<sup>2</sup> Supra, § 52.

<sup>3</sup> R. v. Smith, Dears. C. C. 559; 33 Eng. Law & Eq. 567; R. v. Jarvis, 2

Mood. & R. 40; Callahan v. State, 21

Ohio St. R. 306; Walker v. State, 8

Ind. 290. Supra, § 19-26, 42.

<sup>4</sup> Supra, § 55.

mines that only the blood of the supposed offender can relieve the pang. So also for the smallest plunder murders have been deliberately executed. We have an illustration of this in the trial of Müller, in England, in 1873, for the murder of Briggs. Briggs's watch was seen by Müller in a railway car. Briggs was asleep: the watch was exposed; and Müller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the homicide with the motive. Until the confession the justice of the conviction was largely criticised, on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and with chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime; never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical; for when passion is once allowed to operate, reason loosens its restraints.<sup>1</sup>

#### VII. INFERENCE FROM NATURE OF INSTRUMENT USED.

§ 671. Undoubtedly we find it constantly stated that from a deadly instrument the law presumes a deadly design.<sup>2</sup> But, in the

<sup>1</sup> See this well argued in London Spectator of November 17, 1874, page 1426.

<sup>2</sup> See Com v. York, 9 Metcalf, 93; Foster, 255; 1 East P. C. 340; State v. Peters, 2 Rice's Digest, 106; State v. Town, Wright's R. 75; Woodsides v. State, 2 How. Miss. R. 656; Conner v. State, 4 Yerger, 137; State v. Irwin, 1 Haywood, 112; People v. M'Leod, 1 Hill's N. Y. R. 379; U. S. v. Cornell, 2 Mason, 91; Com. v. Drew, 4 Mass. 391; Resp. v. Bob, 4

Dallas, 146; Penna. v. Honeyman, Addison, 148; State v. Zeller, 2 Halst. 220; State v. Merrill, 2 Dev. 269; State v. Smith, 2 Strobb. 77; R. v. Martin, 3 C. & P. 211; R. v. Pitts, C. & M. 284; R. v. Cheeseman, 7 C. & P. 455; R. v. Shaw, 6 C. & P. 372; Com. v. Webster, 5 Cush. 320; Com. v. Hill, 2 Grattan, 594. See U. S. v. Mingo, 2 Curtis, C. C. 1; 7 Bost. Law Rep. 435; People v. March, 6 Cal. 543; State v. Knight, 43 Maine, 11; Riggs v. State, 30 Miss. (1 George)

first place, this, so far, as it concerns the logical process, is a mere *petitio principii*; the design being held deadly because the instrument is deadly, and the instrument being held deadly because the design is deadly. And in the second place, the use of the term "law" is ambiguous, and is likely to mislead. If it be said that the use of a weapon likely to inflict a mortal blow implies, as a presumption of law, in its technical sense, a deadly design, this is an error; and *a fortiori* is it so when it is said that the use of such a weapon implies a malicious design. There is no such thing, as we have already noticed, as a purely abstract killing;<sup>1</sup> no killing can be proved in a court of justice except in the concrete, accompanied by such circumstances as enable us, as a matter of probable reasoning, to determine whether the killing was or was not malicious. An executioner, under mandate of law, hangs a convict; here the instrument of death is deadly, but no malice is inferred. In the same category fall by far the greater number of violent deaths which history records; those of persons killed in the due course of legitimate war. On the other hand, when a person without authority, and with the appearance of deliberation, shoots another, we infer, as a presumption of *fact* (not of *law*), design. There is no *petitio principii* in this. We do not say, even viewing the question as a presumption of fact, that the killing was designed because it was designed. What we say is this: Taking aim at another with a gun, by a person without authority, and not in public war, and then firing, ordinarily implies an intent to kill; this was a case of such taking aim without authority; therefore this implies an intent to kill. Or, to vary the formula: for a strong man, in possession of his senses persistently and violently to kick a child on its vital parts can only be explained on the hypothesis of malice; this was such a case; therefore this case can only be explained on the hypothesis of malice. Or, again: to lock a child up in a room and knowingly to leave him without food for a week implies malice; this the defendant did; therefore, in this case, malice is to be implied. We cannot, in this case, leave out the word "knowingly;"

635; Mitchell v. State, 5 Yerger, 340; 224; Murphy v. People, 37 Ill. 447; State v. Johnson, 3 Jones (N. C.), State v. Bertrand, 3 Oregon, 61; Kriel 266; Green v. State, 28 Miss. (6 v. Com. 5 Bush (Ky.), 362; Dixon v. Cush.) 687; State v. Decklotts, 19 State, 13 Fla. 636.  
Iowa, 447; State v. Shippey, 10 Minne.

<sup>1</sup> See supra, § 664, 669.

for such a locking up might be accidental, in which case there would be no inference of malice. Yet "knowledge" in such a case is not a presumption of law, but an inference of inductive reasoning, to be drawn from a series of facts. It is incorrect, therefore, to tell a jury that malice, when the weapon is deadly, is a presumption of law. But while telling them that whether there is or is not malice is a point to be determined by a scrutiny of all the facts in the case, it is proper to remind them that there are certain rules of probable reasoning which it is right for them to keep in view. And one of these rules is that when a responsible person without authority, and under such circumstances as indicate deliberation, without apparent provocation or necessity, wounds another in a vital part with a deadly weapon, then malice is to be inferred.<sup>1</sup>

<sup>1</sup> See, as authorities bearing on this topic, *U. S. v. Cornell*, 2 Mason, 91; *State v. Smith*, 2 Strobb. 77; *Com. v. Drew*, 4 Mass. 391; *Res. v. Bob*, 4 Dallas, 146; *Penn. v. Honeyman*, Addison, 148; *Penn. v. McFall*, *Ibid.* 257; *Penn. v. Lewis*, *Ibid.* 282; *State v. Zeller*, 2 Halsted, 220; *State v. Merrill*, 2 Dev. 269; *People v. McLeod*, 1 Hill's N. Y. R. 377; *State v. Town*, Wright, 75; *State v. Irwin*, 1 Hayw. 112; *State v. Peters*, 2 Rice's Dig. 106; *State v. Turner*, Wright, 20; *Woodside v. State*, 2 Howard's Miss. R. 656; *Dexter v. Spear*, 4 Mason, 115; *Bivens v. State*, 6 Eng. (Ark.) 455; *Seaborn v. State*, 20 Ala. 15; *U. S. v. McGlue*, 1 Curtis Ct. Ct. 1; *People v. Clark*, 3 Selden, 385; *People v. Sullivan*, *Ibid.* 396; *People v. Kirby*, 2 Parker C. R. 28; *Kilpatrick v. Com.* 7 Casey, 198; *Mitchum v. State*, 11 Georgia, 615; *Bird v. State*, 14 Georgia, 43; *Green v. State*, 28 Mississippi, 687; *Price v. State*, 36 Missis. 531; *U. S. v. Mingo*, 9 Curtis C. C. 1; *U. S. v. Armstrong*, 2 Curtis C. C. 446; *State v. Johnson*, 3 Jones Law (N. C.), 226; *Com. v. York*, 9 Metc. 93 — Wilde, J., diss.; *Com. v. Webster*, 5 Cush. 290; *People v. Barry*, 31 Cal. 357; *Clem v.*

*State*, 31 Ind. 480; *Bradley v. State*, *Ibid.* 492; *Holland v. State*, 12 Florida, 117; *McAdams v. State*, 25 Ark. 405; *Murphy v. People*, 37 Ill. 447; *State v. Hoyt*, 13 Minn. 132; *State v. Bertrand*, 3 Oregon, 61; *State v. Decklotts*, 19 Iowa, 447; *State v. Shippey*, 10 Minn. 223; *Jeff v. State*, 39 Missis. 593; *Isaacs v. State*, 25 Texas, 174; *Clarke v. State*, 55 Ga. 75; *State v. Brown*, 12 Minn. 538; though see *Smith v. Com.* 1 Duvall (Ky.), 224; *Coffee v. State*, 3 Yerger, 283; *Dove v. State*, 3 Heisk. 348; *Hamby v. State*, 36 Tex. 342; *Barcus v. State*, 49 Missis. 17; *State v. Keith*, 9 Nev. 15; *Gale v. People*, 26 Mich. 157; *O'Mara v. Com.* 75 Penn. St. 424, where it is said that all killing is *prima facie* murder.

Judge Grover, in *Stokes v. People*, 53 N. Y. 164, delivering the unanimous opinion of the court of appeals, said: — . . . .

"It can hardly be supposed that, under such proof as to what the circumstances really were, the judge intended to charge the jury that the law implied the crime of murder from proof of killing under the circumstances of the case, and upon such proof such an instruction would have been erroneous.

## VIII. INFERENCE FROM CONDITION OF WEAPONS.

§ 672. In July, 1683, the Earl of Essex was found dead in the Tower, with his throat cut, and a razor lying near him. His throat was smoothly and evenly cut from one side to the other, and entirely down to the vertebral column. Notwithstanding this, the razor was found to be much notched on the edge. This fact, those who favored the view of suicide were asked to explain. They could do so in no other way than by supposing that the deceased had notched the razor by drawing it backwards and forwards on the neck bone. This he could hardly be deemed competent to do after all the great vessels of the neck had been divided.<sup>1</sup>

The instruction in effect was, and the jury must so have understood it, that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter or excusable homicide. . . .

"But for the idea conveyed by the part of the charge excepted to, that the law implied the crime of murder in the first degree from the proof of killing only, unless the prisoner satisfied them it was not murder, the benefit of the doubt to be given to the prisoner would not have been restricted to their finding the evidence evenly balanced, so that they did not know where the truth lay; on the contrary, the instruction would have been not to convict of that crime, unless convinced by all the evidence in the case that he was guilty, and that if a careful examination of all the evidence left in their minds reasonable doubts of his guilt, they should give the prisoner the benefit by an acquittal."

This is sound law, in conformity with what is stated in the text. At the same time, we must repeat that while it is essential to maintain that

intent is an inference of fact, to be drawn by the jury from all the circumstances of the case, it is important that questions of this kind should not be left to the jury without such instructions from the judge as will lead them to make correct inferences. They should be reminded that all acts committed by intelligent persons are, by the processes of natural reasoning, presumed to have been intended by such persons; that this intent is not proved substantively, but inferred from acts and declarations; and that though the jury have to determine this question, they must be guided by the ordinary rules of inductive reasoning. And they should be also told (and in this respect the opinion just quoted falls short), that presumptions of fact of this kind are as much *proof* as are any other part of the evidence of the case, and are to be taken into consideration as part of the case when the jury apply the question of reasonable doubt.

To same effect see *Floyd v. State*, 3 Heisk. 342; and see remarks of Judge Wells in *Com. v. Sturtevant*, Appendix.

<sup>1</sup> See 2 Whart. & St. Med. Jur. (3d ed.) § 718 *et seq.*; and see *Com. v. Sturtevant*, Appendix.

## IX. INFERENCES FROM POSITION OF WEAPON.

§ 678. In the case of Courvoiser, who was tried for the murder of Lord William Russell, there were two facts relied upon to show that this was not a case of suicide. One was that a napkin was placed over the face of the deceased, and the other that the instrument of death did not lie near the body.<sup>1</sup> To the same point is the case of Jane Norkott, who was found dead in her bed with her throat cut, while a bloody knife was found sticking in the floor a good distance from the bed, but as it stuck, the point was turned toward the bed and the haft from it. Yet in such case the jury must be satisfied that the body was not moved between the death and the period of observation. Thus Mr. Taylor<sup>2</sup> tells us of a case of homicide in which the "weapon, a razor, was found under the left shoulder; a most unusual situation, but which, it appears, it had taken owing to the body having been carelessly turned over before it was seen by the surgeon first called."<sup>3</sup> That the weapon is firmly grasped in the deceased's hand, affords a strong presumption of suicide.<sup>4</sup> When it is placed in the hand after death, it is held loosely. That the instrument (*e. g.* a razor) was *closed*, is not conclusive against the hypothesis of suicide.<sup>5</sup> So it may be that the weapon

<sup>1</sup> 2 Beck, Med. J. 86.

<sup>2</sup> Med. Jur. by Reese, 284.

<sup>3</sup> See 2 Whart. & St. Med. Jur. 3d ed. § 722.

<sup>4</sup> 2 Whart. & St. Med. Jur. 3d ed. § 722. See Taylor's Med. Jur. by Reese, 284.

<sup>5</sup> See case reported in Whart. & St. *ut supra*, § 722.

It is not unusual to endeavor to induce the suspicion of suicide, by placing some instrument of destruction near to the murdered party. In the year 1764, a citizen of Liege was found shot, and his own pistol was discovered lying near him; from which circumstance, together with that of no person having been seen to enter or leave the house of the deceased, it was concluded that he had destroyed himself; but upon examining the ball by which he had been

killed, it was found to be too large ever to have entered that pistol, and the real murderers were ultimately discovered. Green, Berry, and Hill were tried in the year 1678, for the murder of Sir Edmundbury Godfrey, who was strangled by a handkerchief, in Somerset House, on a Saturday night; and after remaining concealed until the following Wednesday, he was carried at midnight into the fields beyond Soho, and thrown into a ditch, and his own sword thrust through his body, in order to excite a belief that he had committed suicide. 7 St. Tr. 159. But in cases of this kind consistency is often overlooked, as by placing the weapon in the left hand, a curious instance of which took place in the case of Margaret Webb, for whose murder John Fitler was tried at the Warwick summer assizes, 1834, before Mr. Jus-



found near the person of the deceased is not the one with which the crime has been committed. So the amount of blood flowing may be considered to determine whether the wounds were homicidal or accidental.<sup>1</sup>

#### X. INFERENCES FROM CONDITION OF DRESS.

§ 674. Dress, independently of the questions to be hereafter noticed, adds often an important element of indicatory proof. Thus in a case cited by Taylor,<sup>2</sup> there were two cuts in a shirt produced in evidence. These cuts were near each other, and precisely similar; leading to the inference that the knife producing them went through two folds of the shirt. From this, however, it followed that the shirt could not have been on the deceased at the time of the wounding, since if it had been there would have been *three* not *two* cuts. So, on the trial of Stokes for the murder of Fisk, in 1873, the condition of the deceased's cloak, immediately after the wound, was admitted to show the force and direction of the shot. Nor is it necessary, it has been ruled, that the garments in question should be themselves produced. Their condition can be described by witnesses without such production, if their non-production is satisfactorily explained.<sup>3</sup> But if practicable they should be secured and brought into court, though before admitting them there should be evidence that they have not been tampered with since the killing.

Mr. Wills<sup>4</sup> says:—

“Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti*, or by means of wounds or marks inflicted upon the person of the offender. A woman who was tried for setting the prosecutor's ricks on fire had been met near the ricks about two hours after midnight, and a tinder-box was found near the spot containing some unburnt cotton rag, as also a piece of the woman's neckerchief in one of the ricks where the

tics Taunton. Am. Reg. for 1834, p. 115; Wills Cir. Ev. p. 112.

<sup>1</sup> O'Mara v. Com. 75 Penn. St. 424.

<sup>2</sup> Taylor's Med. J. by Reese, p. 274.

<sup>3</sup> Com. v. Pope, 103 Mass. 440.

<sup>4</sup> Wills on Circumstantial Evidence, 5th Am. ed., pages 119, 120.

fire had been extinguished. The piece of cotton in the tinder-box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box at her lodgings; that a neckerchief taken from a bundle belonging to the prisoner, found in her lodgings, corresponded with the color, pattern, and fabric of the piece found in the rick, and that they had both belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces were hemmed with black sewing silk of the same quality (whereas articles of that description were generally sewed with cotton), he clearly inferred that they were the work of the same person. The prisoner was capitally convicted, but there being reason to believe that she was of unsound mind, she was reprieved."

#### XI. INFERENCE AS TO OWNERSHIP OF WEAPON.

§ 675. If, however, the instrument of death has been found, and homicide is suspected, the inquiry becomes important, to whom does it belong? In order to ascertain the ownership, it will be necessary to examine the weapon itself carefully for any name or other mark by which it may be identified, and to inquire who possessed such a weapon; whether any one purchased or procured one of the kind a short time before the murder was committed; whether any one was observed preparing it for use; whether there are any marks upon it to indicate the hand, or the size of the hand in which it was held, or the direction in which the fatal blow was given; whether the weapon is imperfect or broken, and if so, who has been observed in possession of a fragment corresponding to the broken portion. Thus, in a trial in Philadelphia, in 1845, the prisoner's agency was determined by the fact that the profile of a notched hatchet with which the homicide was committed, was found pencilled in blood on his handkerchief, with which the hatchet probably had been wiped. So, when the death was produced by a dirk knife, the possession of such a knife was traced to the prisoner on the day of the homicide, and on the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar near the spot. Afterwards upon a *post-mortem* examination of the deceased, the blade of a knife was found broken in his heart.

Some of the witnesses testified to the identity of the handle as that of the knife previously in possession of the accused, but there was no evidence to the identity of the blade. The question remained, therefore, whether the blade belonged to the handle, and when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other, that no person could doubt that they had belonged together, because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match.<sup>1</sup> An instance of a somewhat similar character is mentioned of a trial before Lord Eldon of murder with a pistol. The surgeon had stated in his testimony, that the pistol must have been fired near the body, because the body was blackened, and the wad was found in the wound. It being asked by the judge if he had preserved that wad, he said that he had, but had not examined it; on being requested so to do, he unrolled it carefully, and on examination, it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad, as shown by the texture of the paper and purport and form of stanzas of the two portions, was found in the pocket of the accused, and tended to fix him as the person who loaded the pistol. So also in an authoritative case of circumstantial evidence in Massachusetts in 1874,<sup>2</sup> a stake by which the murder was effected was connected with the defendant by evidence that the stake fitted into a particular cart.

## XII. INFERENCES FROM WOUND.

§ 676. In ordinary cases the shape of the wound will agree with the instrument with which it has been produced. This is particularly the case with those inflicted by a knife, a dirk, a sword, or a razor, or, in general, by any sharp weapon by which a cut or thrust may be made. If, however, death has been produced by a bruise or contusion,<sup>3</sup> the case presents more difficulty, as it not unfrequently happens that such wounds are unaccompanied with any mark of external violence. In almost every case, however, a careful investigation will lead to the discovery whether the instrument were blunt or sharp, of wood or of metal, whether

<sup>1</sup> Bemis's Webster's case, p. 466.

ed. § 694; *Gardiner v. People*, 6 Parker C. R. 155.

<sup>2</sup> *Com. v. Sturtevant*, Appendix.

<sup>3</sup> See 2 Whart. & St. Med. Jur. 3d

the blows were repeated, and whether they were sufficient to cause death.

§ 677. *Marks of powder on person.*—If the wound has been produced by a gun or pistol, it becomes necessary to inquire whether it was received from a person near at hand, or at a distance, whether the aim would appear to have been deliberately taken, and whether the position of the deceased, and the location and direction of the wound are such as sufficiently to indicate the premeditation of the act.<sup>1</sup> Of the effect with which such evidence may be used, an illustration is given by a case some years ago in Ireland. The question was, whether in a scuffle a pistol had accidentally gone off and occasioned the death, or whether the assailant had deliberately fired at him from some distance. The sons of the deceased swore that the pistol was fired from some distance, the prisoner taking deliberate aim. This was confirmed by the dying declaration of the deceased. But on a careful examination of the body, which was disinterred for that purpose, the surgeon was enabled to swear positively, that the pistol must have been fired close to the body of the deceased, as there distinctly appeared the marks of powder and burning on the wrist. So conclusive was this evidence deemed, that the prisoner was acquitted, and the parties who had appeared as witnesses against him were indicted and convicted of perjury.

§ 678. *Direction of wound.*—Where the deceased was shot in the street, when looking at a parade, and where the question was whether he was killed by a stray shot, or by a gun which there was some evidence to show was aimed from a third story window, the doubt was solved by the slanting direction of the wound.<sup>2</sup> The same point was made in another case, stated by Watson, where the prisoner was tried for shooting a man who came to his house under suspicious circumstances. The defence was that the ground being rough and slippery, the prisoner stumbled, and both barrels of the gun had gone off by accident. This statement was confirmed by tracing the direction of the shot in the body of the deceased, which was found to be pointed upwards.<sup>3</sup> But evidence of this kind must be received with much caution. Thus, in an interesting case tried in Texas, in

<sup>1</sup> See 2 Wharton & St. Med. Jur. § 689-702; Watson on Homicide, § 697. 276.

<sup>2</sup> 2 Whart. & St. Med. Jur. (3d ed.) <sup>3</sup> Watson on Homicide, 276.

1873,<sup>1</sup> the evidence was that Saunders, who was a hired servant of Huffhines, was in the habit of getting up in the night to look after the horses in his care. On the night of the homicide he pretended to suspect that some interloper was prowling about the premises, and he called the deceased to go out with him to look. He had a pistol; and when they were a short distance from the house, the deceased was killed by a shot from the pistol in the hands of the defendant. The defence was that the shot was accidental; that the deceased, at the time of the shooting, was walking before the defendant; that the defendant had cocked his pistol, and was trying to let the hammer down, holding the pistol in his hands, at an angle of about 45°; that the hammer slipped from under his thumb, causing an accidental discharge of the pistol, the ball penetrating, as he supposed, the deceased's back. In point of fact, however, the ball entered the head of the deceased, about the base of the occipital bone, proceeding about two inches in a downward range towards the chin. Experts were produced to contradict the defendant's statement by showing that it was irreconcilable with the course actually taken by the ball. The defendant was on this evidence convicted and sentenced to death; but in the supreme court the judgment was reversed and a new trial ordered.<sup>2</sup> The view

<sup>1</sup> Saunders v. State, 37 Tex. 710.

<sup>2</sup> "The State," said Walker, J., has adopted a theory, favored by the evidence of professional witnesses, inconsistent with the statements of the appellant, which appears to be predicated (to postulate?) that the direction of the ball, after it entered the head of the deceased, must necessarily have followed the prolongation of a straight line from the point at which it was discharged from the pistol. This theory, if true, to account for the depression in the line of direction pursued by the ball, after entering the man's head, would establish the fact that the ball must have been fired from a point higher than the head of the deceased, which might, perhaps, involve the case in speculation, if not in absurdity. At all events, it is inconsistent with the idea that the pistol was held in

the ordinary position in which such weapons are held when aimed at an object, if the theory of the State be correct. But, after having examined some authorities of very high standing on gunshot wounds, and particularly the reports of surgeons employed in the field and base hospitals during the late war in the United States, we are perfectly satisfied that to whatever degree of perfection the noble science of surgery may have been brought, no rules have ever been laid down or attempted to establish the geometrical direction of war missiles after entering the human body. Where bodies of equal density, and of spherical form (as in case of the ivory balls used in the game of billiards) are brought in contact, they will separate, on the geometrical principle that the angle of incidence is equal to the angle of reflection. This, however, de-

taken by the court, as is well observed by a contemporary critic,<sup>1</sup> is sustained in substance by high authority as well as by sound reason. No positive rule can be laid down as to the precise

depends upon the condition that the cue, by which the moving ball is forced, shall strike precisely upon its centre,—the skilful player well understanding how to produce or avoid this result. Many illustrations might be given of this principle on the billiard table. But when bodies of unequal density and different in form are brought in contact by equal or unequal forces, the principle by which they will be deflected depends upon so many conditions as to have so far utterly baffled any law which science has established. There are plenty of living men who could, upon their own bodies illustrate the erratic and utterly uncertain direction of gunshot wounds, by a simple reference to the wound of entrance and the wound of exit. A ball passing through the atmosphere under a diminishing force will be deflected more easily than one flying with the full velocity of its exit from the muzzle of the piece from which it is discharged. Many instances are found where partially spent balls, entering merely the muscular parts of the human body, have traversed a line varying many degrees from the line upon which they entered the body. The most remarkable and singular results are often witnessed where leaden balls come in contact with the tough sinewous cartilages or ossified parts of the human body. Nevertheless it is true that the conical balls used in modern warfare, when passing through a line of any direction with great velocity, and brought in contact with substances of less density, will pass forward on a straight line for a short distance, unless the form of the object be such as to exert an unequal resistance on the striking surfaces. We

feel sure we are authorized in these remarks by the experience and scientific observation of every author who has treated the subject, and especially those who have written from personal observation. We do not feel authorized in a legal opinion to enter at length into mere scientific speculations. But we think in this case we are called on to deduce from science as far as it goes, and from known facts and principles, whatever can be so legitimately deduced in favor of innocence and human life.

“The State offered in evidence the testimony which the appellant furnished against himself, and then, taking everything for granted which could fix the guilt of the appellant, those parts of his statement which would imply his innocence are attacked by the evidence of surgeons, whose statements, we believe, have been allowed an undue force by the jury. No member of the profession, whose experience has extended to this class of cases, need be admonished of the danger of relying too much on the opinion of experts. . . . We have twice very carefully examined this record, and the case has been argued, with great ability to the court, and we feel that we should be doing great wrong in taking away the life of a human being upon doubtful and uncertain evidence, were we to affirm this judgment. We regard it as one of those cases where the law has been violated in not giving the accused the benefit of those grave doubts which must rest upon every well informed mind that has attended to all the evidence in the case. We therefore reverse the judgment of the district court and remand the case.”

<sup>1</sup> Cent. L. J. Sept. 19, 1874.

course taken by a ball when entering a human body. It does not necessarily pursue a straight course, and is deflected by obstacles which at the first glance seem inappreciable.<sup>1</sup> In respect to the direction of incised and punctured wounds greater accuracy of conclusion, as is elsewhere discussed, can be reached.<sup>2</sup>

§ 679. *In incised wounds, inference to be drawn from the skill of infliction.* — A person acquainted with anatomy is likely, if the object be to kill, to strike at a vital part; and hence, when a wound is skilfully directed to such a vital part as an ordinary observer would not be acquainted with, special knowledge of the subject is inferred. So, in an English case, a wound was traced to a butcher from the fact that it was inflicted in the way used by butchers in killing sheep.<sup>3</sup>

*Left-handedness* has sometimes been resorted to for the purpose of connecting the defendant with the offence charged; and at all events, if the wound is shown to have been effected by a person who was right-handed, it is a ground of defence that the defendant was left-handed, and there may be a slight inculpatory inference, in case of a left-handed wound, drawn from the fact that the defendant was left-handed.<sup>4</sup>

*Whether a particular wound could have been produced by a particular instrument,* is a question as to which the opinion of experts can be asked.<sup>5</sup> The opinion of an expert as to which of

<sup>1</sup> See this illustrated in 2 Whart. & St. Med. Jur. 3d ed. § 712; and see, as bearing on this point, *State v. Morphy*, 33 Iowa, 270; *State v. Porter*, 34 Iowa, 131.

<sup>2</sup> See 2 Wh. & St. M. J. 3d ed. § 719.

<sup>3</sup> Taylor's Med. Jur. by Reese, 277.

<sup>4</sup> See Taylor's Med. Jur. by Reese, 279; and see *R. v. Phillips*, Woodhull's Trials, 80; Wills Circum. Ev. 97; where Sellis, a servant of the Duke of Cumberland, being found in his bed killed by a razor, the question of suicide or homicide (in which there was an attempt to implicate the duke) arising, the hypothesis of suicide was said at first to be sustained by the fact that the razor was found on the left side of Sellis's bed. This was met by proof that Sellis was ambidextrous.

<sup>5</sup> *Davis v. State*, 28 Md. 15; *State*

*v. Morphy*, 33 Iowa, 270; *State v. Porter*, 34 Iowa, 131; *Com. v. Lenox*, 3 Brewster, 249; though see *Wilson v. People*, 2 Parker C. R. 619. In *Com. v. Twitchell*, 1 Brewster, 566, the defendant called Dr. Gross, and after examining him upon a number of matters, showed to the witness the poker given in evidence by the commonwealth.

The witness said: I have made experiments to ascertain the facility of breaking a human skull with a poker. This is like the poker I saw in the grand jury room.

The following question was then put: State the result of your experiments.

To the district attorney: My experiment was not made with this poker, nor on the body of Mrs. Hill.

two wounds, either of itself necessarily fatal, actually caused the death of the deceased, is competent evidence.<sup>1</sup>

The defendant then offered to show "that the poker offered in evidence by the commonwealth could not inflict the wounds on Mrs. Hill's skull; that the witness had read the reports of the testimony of Dr. Shapleigh, and that in his opinion this poker could not inflict those wounds."

This was objected to, and argued.

Brewster, J. "The offer of the defendant to show that, in the opinion of this witness, the poker could not have produced the wounds, should be admitted. His experiments with another poker on another skull should be excluded."

Ludlow, J. "I concur. In *Champ v. Commonwealth*, 2 Met. (Ky.) 27, the court of appeals said: 'It is agreed on all hands that such opinions, to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true and real points of inquiry, and should therefore always be excluded.'"

Subsequently the following question was put to the witness: "Have you been experimenting with a similar poker upon a human skull? If so, state the result of the experiment." This was objected to. The objection was sustained. The defendant excepted. The following opinion was given by the court (Brewster, J.) in overruling the exceptions:—

"The 20th and 21st reasons assign as error the rejection of 'an opinion' of a medical expert 'based upon experiments recently made,' 'and the result of said experiments.' If a jury can

be bewildered by such confusions of science, we might as well abolish the form of jury trial. A woman is found murdered. Near her body lies a poker stained with blood, and adhering to it is a human hair corresponding in color to the hair of the deceased, and shreds of wool. A respectable physician describes her wounds, and says, in substance, that one of the fractures and a number of the cuts could have been caused by the poker. Now when an accused person offers to show that the stains are not blood—that the hair is not human, or not from the head of the deceased; that the shreds are not wool or not from her cap—or that, in the opinion of medical experts, the instrument found would not cause those wounds, he follows directly in the line of the commonwealth's evidence. This prisoner chose only to pursue the last line of defence. The others, however, were all open to him. But he wished to go further; to do what never has been permitted before in the face of an objection. He proposed to show that some other arm than the defendant's could not with some other poker than that in evidence, inflict such wounds upon some other skull. Of what avail was all this? The weapons, arm, and skull were confessedly different. The experiment must have been made on the skull of corpse. These blows were inflicted upon the head of a living person. The expert must have handled a poker with the view to experiment. The guilty actor in this scene had a motive which might give far greater power to his blow than any force that could be invoked by mere philosophy teaching by example.

"But aside from all these refine-

<sup>1</sup> *Eggler v. State*, 56 N. Y. 642.



*Inference as to whether wound was inflicted before or after death.* — This subject belongs more properly to the department of medical jurisprudence, and is elsewhere discussed.<sup>1</sup>

ments, the offer contradicted nothing. A physician, in one of our criminal trials, swore that the defendant's knife could not produce the wound found upon the throat of the deceased. During the recess, the then district attorney, now of counsel for the accused, directed another surgeon to make the experiment; and the last expert was able to contradict the first by swearing that the weapon had in his hands actually made a still greater wound, and had decapitated a corpse. In *Commonwealth v. Geisenberger* (Oyer and Terminer, Philadelphia, Dec. term, 1858, No. 679), a very respectable physician swore that the blow from the defendant's fist could not have broken the skull of the deceased. A piece of the bone was, however, produced, and it was almost as thin as tissue-paper. Dr. Parkman's skull was fractured with a grape-vine stick. Bemis's Rep. 566.

"In *Champ v. Commonwealth*, 2 Met. (Ky.) Rep. 27, cited by Judge Ludlow upon the trial, Judge Duvall, delivering the opinion of the court of appeals, said: 'It is agreed on all hands that such opinions (of experts), to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. Mere professional opinions upon abstract questions of science, having no proper relation to the facts upon which the jury are to pass, evidently tend to lead their minds away from the true and real points of inquiry, and should therefore be excluded.'

"There is, therefore, nothing in this reason which entitles it to consideration as a question of law. As matter of fact, the defendant cannot stand upon it, for his witness stated that

he did 'not think any poker of this material could have inflicted the wounds, because it is not misshapen sufficiently; it could not have been used four times without bending. . . . It is possible to break the temporal bone with the angle of this poker and to drive the tongue through the fractured skull. There is authority for the assertion that a penetrating wound can be made by a poker. A repetition of the blows would break the bones more.' Dr. Maury stated that he thought 'it extremely doubtful that the wounds could have been inflicted with this instrument, and we see it as it is. . . . It is possible to make a punctured fracture at the temple with that poker; it would be possible to make a lacerated wound with the poker; undoubtedly the whole skull could have been beaten into small pieces with that poker; it depends on the velocity of each blow, and the rapidity with which they are repeated; the temporal bone could have been broken with the heel of the poker, and then the tongue drawn in; have known a skull to be fractured with an umbrella; it was drawn into the skull above the eye.' " The ruling in this case, it must be remembered, was virtually sustained by the supreme court of the state, that court refusing to grant an *allocatur* for a review. In *Davis v. State*, 38 Md. 15, it was ruled that a medical witness may testify as to the nature of the instrument that inflicted the wounds, and also whether the wounds could have been produced in a particular way.

<sup>1</sup> 2 Whart. & St. Med. J. 3d ed. § 702.

§ 680. *Inference from number of wounds.*—In ordinary cases of suicide, but one wound is inflicted, which proves fatal; and if the self-destroyer effects his purpose by a cutting instrument or incisions, he selects the throat; if he stabs himself he selects the chest, particularly the heart or belly; and if he shoots himself he generally does it through the head.<sup>1</sup> It therefore becomes a subject of legitimate investigation whether or not the wounds are in a position likely to have been selected by one seeking instantaneous self-destruction, and whose opportunities and design would be at that which he conceived to be the most vital part. In New York, in 1839, a woman was found dead covered with many wounds. Her husband, who was suspected, asserted that she had destroyed herself. On examination there were found eleven stabs, eight on and about the left side of the thorax, one of which had penetrated the pericardium and divided the trunk of the pulmonary artery at its origin, while the others were on the back near the left shoulder-blade. There was every reason to suppose that the stabs in front and at the back were inflicted at the same time; and the inference was that it was impossible that the latter could have been self-inflicted.<sup>2</sup> So, too, the variety of the wounds will often sufficiently indicate the fact of murder. William Corder was tried at the Bury St. Edmund's summer assizes for the murder of Maria Marten, whose body was discovered in a barn twelve months after her disappearance. He alleged that she had committed suicide, but upon examination of the body a handkerchief was found drawn tightly around the neck; the course of a pistol ball was traced through the left cheek passing out at the right orbit; and three other wounds were found, one of which had entered the heart, and all of which had been made by a sharp instrument, means of death so various and unusual with females as to discredit entirely the statement of the prisoner, and lead to his conviction and execution.<sup>3</sup>

§ 681. *Inference from marks on person.*—It is important to inquire, in cases where the defence of suicide may be started,

<sup>1</sup> See 2 Whart. & St. Med. Jur. 3d ed. § 702 *et seq.*; Watson on Homicide, 276. 1847, t. 2, p. 377. See also a case where a husband inflicted on his wife fifty-six wounds, reported in Taylor's

<sup>2</sup> See also the case of the Duchess of Praslin, reported in Ann. d'Hyg. Med. Jur. by Reese, 281.

<sup>3</sup> Wills Cir. Ev. 169.

whether there are marks upon the person other than those made by the fatal wounds; *e. g.* whether the hands or arms have the appearance of having been held forcibly during the commission of the deed; whether the head appears to have been bruised, as if the victim were first rendered insensible by a blow upon that portion of the frame; whether the wound is in a position that could not have been reached by the deceased, and which may often be ascertained by placing the weapon in the hand of the corpse, and observing whether or not the direction of its probable course corresponds with that of the wound. It must be considered, also, whether there are signs of the presence of another, as in the case of a woman found dead in a room with her throat cut, and a large quantity of blood on her person, while on the floor the presence of another person in that room was clearly demonstrated by the print of a bloody left hand on the left arm of the deceased.<sup>1</sup> All stains or marks of dirt on the person or dress of the deceased should be carefully scrutinized. In the famous case of *Leontade*, where a young girl, after having been ravished was killed, her dress was partially identified, and that of her murderer connected with it, by the fact that on both of them were found traces of evacuations, which took place during the violence committed on her, which evacuations contained the seeds of figs of which she had previously copiously eaten.

The *hands* of the deceased should be examined for the purpose of seeing whether they exhibit any traces of attack or defence.

The *mouth* and *throat* of the deceased, if sleeping at the time of the attack, may have been compressed by the murderer to prevent an outcry; and of this the body may subsequently exhibit signs.<sup>2</sup>

§ 682. *Whether the wounds, if given by another, are to be considered as the result of a momentary passionate impulse, or of premeditation.* — In this, as in the question just considered, the position of the wound is of consequence. When found inflicted in a concealed part, such as a superficial observer would not be likely to notice, the inference of intent is strong.<sup>3</sup> A person acting under the impulse of passion would be likely to inflict a

<sup>1</sup> Case of *Mary Norkot* and others, body, see Whart. & St. Med. Jur. 3d ed. § 697.  
14 Ho. St. Tr. 1324.

<sup>2</sup> As to inferences from stains on      <sup>3</sup> See 2 Whart. & St. Med. Jur. 3d ed. § 697-702-719.

less skilful wound than one whose act was the result of premeditation. Thus, as in one or two Western cases, where the deceased is found with his eyes gouged out, there is little difficulty in deducing the intent. And so in a case where an infant was found with a needle thrust upwards through its navel.

### XIII. INFERENCE FROM BLOOD STAINS.

§ 683. *Traces of blood* near the corpse or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries : 1. Were the wounds self-inflicted, or the act of another? This may in some cases be determined by observing that blood is visible in spots or pools in places where it could not have been if the death had been the result of suicide ; or that there is no communication between the blood on the floor and the corpse ; as if the body had been removed by another from the spot on which the deed was committed. 2. Was the deceased erect or lying down when the wounds were received? It will throw much light on this question if the spots of blood on the adjoining wall, or any other erect body near the locality be examined, as the direction from which they came may frequently be determined from the manner in which they have spattered. Prints of bloody hands may frequently be observed, and impressions of bloody feet which give information as to the direction taken by the murderer after the commission of the act. Care should be taken, however, not to create *indicia* while searching for them.<sup>1</sup> A young man in France was found dead in his bed, with three wounds in the front of his neck. The physician, who was first called to see him had, unknowingly, stamped in the blood with which the floor was deluged, and had then walked into an adjoining room, passing and repassing several times. The consequence was that suspicion was raised against a party who narrowly escaped being committed to take his trial for murder. It subsequently turned out to be a clear case of suicide.<sup>2</sup> The examination of spots supposed to be blood upon the person and clothes of the suspected party is always of the greatest importance, for although this is gener-

<sup>1</sup> See this subject discussed fully in  
2 Wh. & St. M. J. 3d ed. § 724 *et seq.*

<sup>2</sup> 1 Tayl. Med. J. 372; and see Com.  
v. Sturtevant, Appendix.

ally attempted to be explained away by attributing it to an accidental cut or bleeding at the nose, such excuses are commonly easy to disprove if it be satisfactorily ascertained that the spots are caused by blood. On this subject the evidence of Dr. Wyman, in the Webster case, already referred to, is entitled to much weight.<sup>1</sup>

<sup>1</sup> "When blood exists in large quantities, upon furniture, clothing, &c., a general inspection, with the aid of chemistry, will determine its presence with sufficient accuracy. It is, however, not unfrequently found in too small quantities for chemical analysis; and it has happened that the statement of a police-officer, or other non-professional spectator, has been admitted as evidence that the stains in question were those of blood, when the bare announcement by a physician even should be taken with the greatest caution. There are abundant instances, in the treatises on medical jurisprudence, of unfounded charges and unjustifiable arrests having been made, in consequence of an error at the outset, as to the true nature of stains assumed to be blood. It is, therefore, in the highest degree important that examinations should be conducted with the greatest care, and that another sign than color (which has been abundantly proved to be fallacious) should be obtained.

"Recently drawn blood, when placed under the microscope, is at once recognized by the presence of a vast number of flattened discs (commonly, though inaccurately designated as 'blood globules'), of a red color, with a single central spot, interspersed among which may be seen, in far lesser numbers compared with the discs themselves, rounded, colorless globules, containing each three or four central granules. These last are known to physiologists as 'lymph corpuscles,' or 'lymph globules,' proper. If a drop of blood be dried on a piece of

glass, painted wood, or other surface, and a small portion (a thin scale, scraped off with a knife, is the most desirable form) be placed under the microscope, and water added to it, it soon becomes softened, very slightly tinges the water around it with a pale reddish color, and becomes more or less transparent, according to its thickness. After a careful inspection, the observer will seldom be able to find any traces of blood discs, but transparent, colorless spots will be seen scattered through the mass, which with a high power (say 800 diameters) may be seen to have a globular form, and to contain granules, usually three or four. These are the lymph corpuscles. If a drop of blood be rubbed on a piece of glass, as, by drawing a bloody finger across it, so that the discs are deposited in a single layer, and then allowed to dry, they are readily recognized even in the dried state; but when allowed to dry in masses, I have failed to determine their presence. The lymph globules, on the contrary, may be softened out after they have been dried for months, and their characteristic marks readily obtained. I have examined blood which has been dried for six months, and have found it easy to detect them. It is not improbable that they may be detected after the lapse of years, if the blood shall have been preserved dry, so as to prevent decomposition.

"The evidence that the stains on the pantaloons and slippers of Professor Webster were of blood, was derived wholly from the microscope. And the presence of the lymph cor-

In the trial of Leavitt Alley, in Boston, 1873, elsewhere adverted to, the question whether dried human blood can be distinguished from horse blood was largely discussed by experts. Although there was some expert testimony tending to the affirmative, the tenor of the evidence, and that of the subsequent discussion, is that no positive conclusion can be reached on the subject.<sup>1</sup> At all events, any conclusion that may be reached on the question whether a dried blood stain is from human blood is open to such reasonable doubt, that it should not be allowed to determine the deliberations of the jury.<sup>2</sup>

puscles, combined with the color, and other and less characteristic microscopic appearances of the blood, was the basis of the opinion given at the trial.

"While the presence of lymph corpuscles, combined with the ordinary and more obvious appearances of blood, is regarded as the diagnostic sign of blood, yet it should never be lost sight of that it does not give an absolute sign that the blood is never of the human body. The blood of some animals so closely resembles that of man, in its microscopic characters, that, as yet, no positive means exist by which they may be distinguished. The opinion that a stain of blood in question is human or animal, must rest upon improbabilities." Statement by Prof. Wyman, reported in Bemis's Webster case, 90, 91, n. And see 2 Whart. & St. M. J. 3d ed. § 754; Richardson's Hand-book of Med. Micr. Phil. 1871.

<sup>1</sup> See evidence given in 2 Whart. & St. Med. Jur. 3d ed. § 758.

<sup>2</sup> See also Gaines v. Com. 60 Penn. St. 319; State v. Knight, 48 Me. 11. In People v. Lindsay, Pamph. Syracuse, in 1875, evidence was given that human blood could be distinctively identified.

In People v. Gonzales, 35 N. Y. 49, decided by the N. Y. court of appeals in 1868, the officer who made the arrest was permitted to testify that he

found blood on the prisoner's clothes. The court of appeals affirmed this, saying: "Stains of blood found upon the person or clothing of the party accused have always been recognized among the ordinary *indicia* of homicide. The practice of identifying them by circumstantial evidence, and by the inspection of witnesses and jurors, has the sanction of immemorial usage in all criminal tribunals. The testimony of a chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence."

In Com. v. Twitchell, 1 Brewster, 561, the course taken by the court in this relation deserves high commendation. It is thus stated in the report: "At the conclusion of the commonwealth's case, Charles H. T. Collis, Esq., for the defendant, moved that the articles of clothing which the commonwealth's witness, Dr. Levis, had testified were stained with blood, should be delivered for examination by defendant's experts.

"This motion was argued by counsel on both sides.

"Brewster, J. The articles identified by the officers as the clothing of the defendant, having been examined by Dr. Levis, and his opinion having been given to the jury as to the results of his examination thereof, the defendant's counsel have moved that the de-

§ 684. As to the general character of blood stains the following points must be kept in mind : —

Heavy blunt instruments may produce death without immediate death. The defendant's experts be permitted to examine them in the presence of officers of the court. The district attorney has opposed this motion, stating that he is willing that the examination shall take place as desired, if the name of the defendant's expert is submitted to and approved by the commonwealth's officer and by the court. The defendant has declined to submit the name of his expert, and has insisted upon his absolute right to have the articles examined when, where, and by whom he pleases, conceding only that the officers of the court may be present. The articles having been exhibited to the jury, and some of them having been handed to the jury, they must be regarded as in evidence. The defendant should have the fullest right of examination accorded to him, consistent with the preservation of the articles from accidental or intentional destruction. If the object is to inspect by the use of glasses, this can be accomplished by examination in open court, or in an adjoining room, in the presence of officers. If the purpose is to secure a chemical analysis, I think the defendant is entitled, as matter of right, to have such an examination made by any expert he may select; but to guard against the possible destruction of important evidence, the tests should be applied in the presence of the court.

"Ludlow, J. A motion having been made by the prisoner's counsel to permit the clothing and other articles which Dr. Levis has examined and identified as being sprinkled, saturated, or smeared with the blood of a mammal, to be examined by some person to be selected by them, but not in the presence of the court, though in the view of an officer or officers to be

selected by the court, it becomes necessary to state what, in my judgment, ought to be the practice of this tribunal.

"1. It is to be noted that the articles in question, except the poker, have not yet been offered in evidence, and they therefore remain in the custody of the commonwealth's officers. This motion is therefore premature.

"2. When the articles shall have been offered in evidence, they are placed in the special custody of the court, to be dealt with as justice requires.

"3. Should the prisoner's counsel then desire them to be examined, the court should see to it that they are guarded from intentional or accidental injury with the most scrupulous care, and they may be examined in open court by any persons selected by the prisoner or his counsel, or if, from necessity, the examination cannot be made accurately in open court, they should be placed in the hands of any respectable chemist or physician to be selected by the prisoner, with the consent of the court. They should be properly identified as the very articles offered in evidence by the commonwealth, before they are delivered to the person who has been selected by the prisoner's counsel, and for this purpose that person should receive them in open court; and they should then be examined in the presence of an officer or officers of the court.

"The defendant's counsel refusing to submit the names of their experts to the court, it was ordered that all the articles be taken to the grand jury room, on the next Saturday morning at half-past nine o'clock, there to be produced by the district attorney in the presence of the judges, the counsel,

ate effusion of blood ;<sup>1</sup> a weapon may be wiped after the fatal blow ; and in all cases, the handle, casement, and joints of the weapon should be scrutinized. Often a weapon, after inflicting a rapid incised or punctured wound, is wiped by the edges of the wound closing before blood has reached the surface.

In stabs the dagger or knife may inflict death without receiving any blood stains, or at the most, a film which leaves when dried a faint yellow-brown tinge.

The absence of blood stains on the dress of the accused affords but a slight presumption of innocence, even in cases of violent homicide by cutting, since such stains may have been effaced, and since, also, there are many cases of such homicides (*e. g.* cutting a throat from behind), in which the blood would not reach the person of the assailant.<sup>2</sup>

The form and direction of blood spots on furniture may indicate the position of a wounded person in respect to such spots.

On clothing, supposing it to be identified with the deceased, which is a prerequisite,<sup>3</sup> the direction of the flow of the blood must be examined. If downwards it proves an upper blow, and indicates that the wounded person was more or less erect at the time of the wound.

Splattering may indicate an arterial wound, or a continued struggle.

On shirts, blood stains may arise from flea or mosquito bites ; and the shirt may have been worn on both sides. In Alley's case, tried in Boston in 1873, one alternative presented by the defence was that the blood was caused by a menstrual discharge from the defendant's wife. But when the blood is dried, no satisfactory solution of this question can, as has been already seen, be reached.<sup>4</sup>

for the prisoner, and such experts as they might select." As is elsewhere argued, private examinations taken by experts without notice to the other side are as *ex parte* as private affidavits taken without notice to the other side. The proper course is to require due notice of such examination, and to reject the result of the examination, unless such notice were given, and unless the integrity of the thing examined be proved. Wh. C. L. 7th ed. § 822.

<sup>1</sup> 2 Whart. & St. Med. J. § 689. In *O'Mara v. Com.* 75 Penn. St. 424, it was held that character of effusion of blood was admissible to indicate wound.

<sup>2</sup> Taylor's Med. Jur. by Reese, 290.

<sup>3</sup> If lost, secondary evidence of the condition of the clothing may be given. *Com. v. Pope*, 103 Mass. 440.

<sup>4</sup> See as to general bearing of such evidence, *Com. v. Sturtevant*, Appendix ; *Com. v. Udderzook*, Appen-



## XIV. INFERENCE FROM THINGS ADHERING TO WEAPON.

§ 685. *Hair or other parts of body may adhere to the weapon.*

— This, in respect to hair, is strong evidence connecting the weapon with the homicide, when the hair resembles that of the deceased. But hair should be carefully examined by microscope so as to determine whether or no it is human. Thus, Dr. Lyons details a case where a *prima facie* case of homicide was rebutted by proof that the hair was that of a brute.<sup>1</sup> So, in a case tried in Massachusetts in 1874, an inference that a stake traced to the defendant had been used in the homicide was drawn from the fact that the stake, besides being bloody, had on it a piece of bone, such as in the blow given might have been taken from the deceased.<sup>2</sup>

§ 686. *So of fibres of clothing.* — In a case cited by Dr. Taylor,<sup>3</sup> “a razor was produced in evidence, with which it was alleged the throat of the deceased had been cut. I examined the edge microscopically, and separated some small fibres from a coagulum of blood, which, under a high magnifying power, turned out to be cotton fibres. It was proved that the assassin, in cutting the throat of the deceased while lying asleep, had cut through one of the strings of her cotton night-cap.” Other cases are cited by the same author of woollen fibres thus being mixed with blood.

## XV. INFERENCE FROM LIABILITY TO ATTACK.

§ 687. This may arise from three different causes: 1st. The possession of money or valuable articles; 2d. An old grudge, or similar cause, such as a previous quarrel; and 3d. Jealousy. In the first of these cases the questions arise whether the fact that the deceased was in the possession of money, particularly if the amount be considerable, was known to any one; and if so, to whom; whether money was found on the corpse or was missing; whether there is evidence that any suspected party, suddenly and from an unexplained cause, became possessed of a large sum,<sup>4</sup> paid long standing and pressing debts of considerable amounts, or remarkably increased his expenditures? Pedlers,

dix, as to marks of blood on a wagon used by defendant; and *People v. Lindsay*, Pamph. Rep. Syracuse, 1875.

<sup>1</sup> Apology for the Microscope, p. 24.

<sup>2</sup> *Com. v. Sturtevant*, Appendix.

<sup>3</sup> *R. v. Harrington*, Taylor's Med. Jur. by Reese, 386.

<sup>4</sup> See *Kennedy v. People*, 39 N. Y. 245.

especially itinerant vendors of jewelry and other valuable articles, are from this cause rendered peculiarly liable to attack, and it is of importance to inquire, in cases of this description, who was last seen in company with the deceased, or with any of the articles known to have been in his possession.<sup>1</sup> Hence it is always admissible to introduce evidence, showing that the deceased had a pecuniary claim on the defendant.<sup>2</sup>

<sup>1</sup> Wills on Circum. Ev. 237-243.

<sup>2</sup> Hamby v. State, 36 Tex. 523.

"On a late trial for murder, Lord Chief Justice Campbell thus summed up the doctrine under discussion: 'With respect to the alleged motive it was of great importance to see whether there was a motive for committing such a crime, or whether there was not; or whether there was an improbability of its having been committed so strong as not to be overpowered by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know from the experience of criminal courts, that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off, for a time, pressing difficulties.'" Wills Circum. Ev. 5th American ed., pages 43-4.

See also remarks of Judge Wells, in Com. v. Sturtevant, Appendix.

"Another form in which murder is committed for the sake of immediate gain is when the property of a person has been, by the force of circumstances, brought under the control or within the reach of another; and nothing but the life of such person prevents its passing entirely into the other's hands. If, by the force of the same circumstances, or by actual contrivance or artifice, the person also is brought within reach, a motive of great force is presented, to attempt the removal

of the obstacle by criminal means. In the case of *Rex v. Burdock* (see Best on Pres. § 196), an elderly lady, possessed of some property, had gone to live with the prisoner, who kept a lodging-house. Being taken unwell, and attended by the prisoner, the cupidity of the latter was excited so strongly, as to induce her to administer poison in some gruel which she prevailed on her lodger to take, and which resulted in death. The change which was observed soon after in the prisoner's life and habits showed that the death had been to her a lucrative event; and, on the evidence of this, and other cogent circumstances, she was convicted and executed. In the case of *Rex v. Patch* (see Wills Circum. Ev. 230), the prisoner, who boarded with his employer, had been enabled, from his relations to the latter, to obtain, to a considerable extent the control of his business, and was endeavoring to secure it permanently by a course of fraud. His plans being in danger of frustration by the vigilance of his employer, he was tempted to put the latter out of the way, which he did by shooting him one evening, as he sat in his parlor. The crime, in this case, seems to have been induced by the double motive of the desire of gain, and the fear of detection." Burrill Cir. Evidence, pages 287-8.

In the trial of the Knapps for the murder of Joseph White, it appeared that Mr. White was childless, and left as his legal representatives Mrs. Beckford, his housekeeper, the only

§ 688. Where the absence of other motive makes it probable that the cause was an old grudge, the inquiry then arises, with

child of a deceased sister, and four nephews and nieces, the children of a deceased brother. He had executed, as was known in the family, a will by which he left by far the larger portion of his estate to Stephen White, one of the children of the testator's brother, reserving but a small legacy to Mrs. Beckford. A daughter of Mrs. Beckford married Joseph J. Knapp, Jr., who, with his brother, John Francis Knapp, were young shipmasters of Salem, of respectable family, the sons of Joseph J. Knapp, also a shipmaster. Shortly after the murder, the father received a letter obscurely intimating that the party writing the letter was possessed of a secret connected with the murder, for the preservation of which he demanded a "loan" of three hundred and fifty dollars. This letter Mr. Knapp was unable to comprehend, and handed it to his son, Joseph J. Knapp, who returned it to him, saying he might hand it to a vigilance committee which had been appointed by the citizens on the subject. This the father did, and it led to the arrest of Charles Grant, the person writing the letter, who, after some delay, disclosed the following facts: He (Grant) had been an associate of R. Crowninshield, Jr., and George Crowninshield; he had spent part of the winter at Danvers and Salem, under the name of Carr, part of which time he had been their guest, concealed in their father's house in Danvers; on the 2d of April he saw from the windows of the house Frank Knapp and a young man named Allen ride up to the house; George walked away with Frank, and Richard with Allen, and on their return, George told Richard that Frank wished them to undertake to kill Mr. White, and

that J. J. Knapp, Jr., would pay one thousand dollars for the job. They proposed various modes of doing it, and asked Grant to be concerned, which he declined. George said the housekeeper would be away all the time; that the object of Joseph J. Knapp, Jr., was first to destroy the will, and that he could get from the housekeeper the keys of the iron chest in which it was kept. Frank called again on the same day in a chaise, and rode away with Richard, and on the night of the murder, Grant stayed at the Half-way house, in Lynn. In the mean time suspicion was greatly strengthened by Joseph J. Knapp, Jr., writing a pseudonymous letter to the vigilance committee, trying to throw the suspicion on Stephen White. Richard Crowninshield, Geo. Crowninshield, Joseph J. Knapp, Jr., and John F. Knapp, were arrested and committed for murder. Richard Crowninshield made an ineffectual attempt, when in prison, to influence Grant, who was in the cell below, not to testify, and when this failed, committed suicide. John F. Knapp was then convicted as principal, and Joseph J. Knapp, Jr., as accessory before the fact. George Crowninshield proved an *alibi*, and was discharged.

The motive was the inheritance to White's estate; and yet the murderers acted on a mistake of law, they supposing that Mr. White's representatives, in case of his death intestate, would take *per stirpes*, whereas in fact they would take *per capita*; so that actually Mrs. Beckford, to increase whose estate the murder was committed, received no more by an intestacy than she would have by the will.

whom the deceased has had a recent or violent quarrel, or who from any other relation or action of the deceased toward him would probably be tempted to seek the death of his real or supposed enemy. In connection with this, evidence is always admissible, of threats and declarations of hostile purpose, as well as of quarrels and coolnesses,<sup>1</sup> and it is expedient, therefore, to consider who has used such declarations, and what has been their character.

So it is important to inquire whether there were any debtors of the deceased, in sums which they were unable to pay; and whether their dealings with their creditor had been marked with such urgency on his part, and embarrassment on theirs, as to make his death an object to them of relief. Mr. Attorney General Clifford, in his speech in the Webster case, says in illustration: "Take the case of Colt in New York, for the murder of Adams; there was an indebtedness, and the victim was beguiled by an appointment into the place of business of his murderer, and slain for the debt; or the case, in New Jersey, of Robinson, who killed his creditor, Mr. Suydam, and concealed his remains in his cellar, and who by a strange concurrence of circumstances, was detected, tried, and convicted, and then confessed and was executed, is another instance."<sup>2</sup>

§ 689. The Webster trial itself furnishes many suggestions which, in this class of cases, should be pursued. Was the defendant at the time desperately insolvent? Was his social position such as to make *appearances* of great moment; and had he been in the habit of playing at heavy odds to keep them up?<sup>3</sup> Were the evidences of debt of such a character as if carried on the person could have been easily destroyed; and was there any attempt to induce the deceased to bring them with him to the spot appointed for the interview? What, in other words, were the probabilities of the debt being cancelled by the death; for upon this the question of *intention* would depend? Should it be shown that the debt was one of record, the presumption would be much more in favor of manslaughter, arising from sudden

<sup>1</sup> See *infra*, § 698; *People v. Hendrickson*, 1 Parker C. R. 406.

<sup>2</sup> Bemis's Webster case, 421.

<sup>3</sup> In *Com. v. Twitchell*, 1 Brewster, 560, it was held competent for prose-

cution to prove that defendant was pressed for money, but not that he lived expensively and had no occupation or means.

irritability on being pressed with the debt, than it would be should it appear that the deceased had the sole evidences of debt on his person; that he had been invited to bring them, and that they were afterwards destroyed. All this is evidence, and so are those circumstances from which a countervailing presumption could be drawn, such as the fact that the deceased had independent securities for the debt, on which the defendant was not liable, or that the defendant's circumstances were not such as to render the discharge of the debt of paramount importance.

So in the remarkable trial of Udderzook for the murder of Goss, reported in the Appendix. The deceased's life was largely insured, no doubt in pursuance of a fraudulent conspiracy that after the insurance he should disappear, and the sum be collected from the company. This was attempted; but as his continued existence, after the payment, was inconvenient to his co-conspirator, he was killed by the latter. On the trial, the whole history of the insurance was held legitimate testimony, as showing the motive.

*Jealousy*, and the facts on which it rests, may always be put in evidence as throwing light on motive.<sup>1</sup>

#### XVI. INFERENCE FROM ANTECEDENT PREPARATIONS.

§ 690. It is scarcely necessary to say that presumptions of this class are not presumptions of law, but mere inferences of fact, as to which it is the judge's duty, not to declare a positive rule, but simply to notice the processes of reasoning by which a just conclusion may be reached. Among the facts admissible for this purpose, under this head, are the purchasing, the collecting, the fashioning instruments of mischief,<sup>2</sup> of which the evidence is always admissible, provided it go to connect the defendant with the particular crime. A familiar illustration of this is to be found in the production of evidence on a trial for burglary to prove that the defendant had manufactured or procured the burglarious instrument.<sup>3</sup> Under the same head fall cases where the evidence shows a repairing to the spot destined to be the scene of crime; acts done with the view of originating pro-

<sup>1</sup> See *infra*, § 725; and see *Com. v. Madan*, 102 Mass. 1; *Nesbit v. State*, 48 Ga. 238; *Templeton v. People*, 27 Mich. 501.

<sup>2</sup> *Infra*, § 707. See *R. v. Edwards*, 12 Cox C. C. 230.

<sup>3</sup> *Infra* § 707; *People v. Larned*, 3 Selden N. Y. 445. See *Com. v. Wilson*, 2 Cush. 590; *People v. Winters*, 29 Cal. 658.

ductive or facilitating causes ; for removing obstructions in execution of the design ; for obviating suspicion, &c. A remarkable instance is presented in the case of Richard Patch, who was convicted and executed in 1806, for the murder of his friend and patron, Isaac Blight. The prisoner and the deceased lived in the same house, and the latter was one evening shot, while sitting in his parlor, by a pistol from an unseen hand. A strong and well-connected chain of circumstantial evidence pointed to Patch as the murderer ; and among other facts it appeared that, a few evenings before that on which the murder was committed, and while the deceased was away from home, a loaded gun or pistol had been discharged into the same room. This shot the prisoner represented at the time as fired at him ; but there were strong grounds, especially from the course of the ball through the shutter, for believing that it must have been done by himself, in order to avert suspicion, and induce the deceased and his servants to suppose that assassins were prowling about the building. Of the same character is the case related by Dr. Hitzig, of the woman who, in order to prepare her friends for an intended poisoning, sent once a week for arsenic to the apothecary's, for the alleged purpose of killing rats. So also may be viewed the preliminary statements of Udderzook, in the remarkable trial reported in the Appendix, where he spoke of his intended victim as a person who was hiding himself, or who was supposed to be dead.<sup>1</sup>

§ 691. Leopold Freund was tried in Moravia, in 1874, for the murder of Ernst Katscher. Freund was a Bohemian vagabond, with little money and no employment ; and saw Katscher, a rich brewer, at the railway station of Brünn, take out his pocket-book, and arrange its contents. Freund had previously purchased a third class railway ticket for the next station. In a moment, he seems to have arranged his entire plan. He bought a second class ticket for the next station, intending to get into the same carriage with Katscher, and to kill the latter when asleep. Of course he could have bought a ticket for a more distant station, and for this he had money enough ; but he was unwilling to spend unnecessarily, and so he concluded that if Katscher did not fall asleep before the next station, then a second ticket for the second station could be bought, and so on until the victim

<sup>1</sup> See Appendix to this volume.

could be noiselessly and unresistingly killed. Three tickets were in this way bought in succession, until at last Katscher, having fallen asleep, was attacked and his throat cut before he had time to cry out. Freund rifled his victim's pocket-book, and when the train slackened speed, leaped out of the window. It was dark; and had he acted prudently he might for a time have baffled pursuit. But cautious as were his preparations, after the murder his cunning vanished. He threw the bloody pocket-book in a field. He stopped at an inn at Kögetin, where he left his blood-stained overcoat, as well as a series of receipts addressed to Katscher. He then walked back to Prosnitz, and went out to make purchases in a blood-stained shirt. But his preparations would have led to his conviction, even had he not in this reckless way left evidence of his guilt. The guard found Katscher's body alone in the carriage shortly after the murder; and the guard's attention had been previously curiously directed to Freund by his purchase, at three successive stations, of second class tickets. The guard was therefore able accurately to describe the assassin; and he would have been detected on this evidence, even if he had not left so many marks of guilt on the path by which he fled.

§ 692. To this class of facts may be referred the case of false representations as to the state of another person's health, with the intention of preparing the connections for the event of sudden death, and to diminish the surprise and alarm which attend its occurrence,<sup>1</sup> as was done by Captain Donnellan respecting Sir Theodosius Boughton.<sup>2</sup> It has been remarked that murderers, especially in the lower walks of life, are frequently found busy for some time previous to the act, in throwing out dark hints, spreading rumors, or uttering prophecies relative to the impending fate of their intended victims.<sup>3</sup> In the case of Susannah Holroyd, who was convicted at the Lancaster assizes of 1816 for the murder of her husband, her son, and the child of another person, about a month before committing the crime the prisoner told the mother of the child that she had had her fortune read, and that within six weeks three funerals would go from her door, namely, that of her husband, her son, and of the child of the person whom she was then addressing. And so, on the trial of Zephon in Philadelphia, in 1845, it was shown that

<sup>1</sup> Wills on Circums. Evid. p. 112.

<sup>2</sup> 1 Stark. Evid. 565-6, 3d ed.

<sup>3</sup> See Gurney's Report of the Trial.

the prisoner, who was a negro, had got an old fortune-teller in the neighborhood, of great authority among the blacks, to prophesy the death of the deceased. Great caution, however, should be used, particularly when the persons against whom the presumption is pointed are ignorant and superstitious, since among such the habit of loose talk of this nature is too prevalent to make an instance of it, when standing alone, any just ground for suspicion.

#### XVII. INFERENCE FROM DECLARATIONS OF INTENTION AND THREATS.

§ 693. *By defendant.* — Declarations of intention and threats are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be inferred. Evidence of this kind, for this purpose, is always competent;<sup>1</sup> as where the prisoner, a

<sup>1</sup> *State v. Rash*, 12 Ired. 382; *Johnson v. State*, 17 Alab. 618; *Archbold's C. P.* 288; *Heath v. Com.* 1 Robin. (Va.) 735; *State v. Wentworth*, 37 N. H. 196; *Dunn v. State*, 2 Pike, 229; *Hopkins v. Com.* 14 Wright, 9; *State v. Alford*, 31 Connect. 40; *Stephens v. People*, 4 Parker C. R. 396; *La Beau v. People*, 34 N. Y. 223; *Pitman v. State*, 22 Ark. 354; *Mimms v. State*, 16 Ohio St. 221. See *Moore v. State*, 2 Ohio St. 500; *Cluck v. State*, 40 Ind. 263; *Maxwell v. State*, 8 Heisk. 420. Nor need the menaces be pointed specifically at the deceased. *Hopkins v. Com.* 50 Penn. St. 9. In Florida, it has been held in a prosecution for killing a policeman, that threats of violence made by the defendant, shortly before the homicide, against all policemen, are admissible. *Dixon v. State*, 18 Fla. 636.

"The testimony is, that deceased was a policeman in Jacksonville, and the question was asked of Lloyd, whether, on the day of the alleged murder, he heard the prisoner make threats against any policeman. The witness said he did, 'but not against

any particular policeman.' On being asked to state what those threats were, objection was made by counsel for prisoner, and the court overruled the objection and allowed witness to answer.

"Testimony of this character is admissible to show the *animus* of the accused at the time of the commission of the crime, and sometimes tends to identify the accused person, and is always allowed to go to the jury. Its weight is for their consideration. Murder in the first degree is defined by the statute to be the killing of a human being without authority of law, 'with a premeditated design to effect the death of the person killed, or of any human being.' In determining the nature and degree of the crime, the intent of the accused is to be ascertained, and this is often found in the character and language of threats made and the circumstances under which they are made." *Randall, C. J.* And this is in conformity with the principle heretofore established that proof of general malice to a class sus-



negro, said he intended "to lay for the deceased if he froze the next Saturday night," and where the homicide took place that

tains a charge of malice to one of that class. *Supra*, § 52.

In *Maxwell v. State*, 3 Heisk. 420, the evidence was that four negroes, after a rencounter with two white men and a negro, followed them, armed with guns, with an express purpose to kill the negro and to have revenge on the white men, and went to the house where the negro lived, and inquired for him, when they were confronted by the white men and asked "What's up now?" when one of the prisoner's party said, "Nothing, G—d d—n it; we will show you," and fired. It was held, that the evidence not establishing a specific intent to kill the prosecutor, and the shooting being so sudden that there was no time for consultation between the person firing and the prisoner, the previous design to kill the particular individual assaulted was not established as to the party; and that the intent, if formed in the mind of the individual assailant, was not brought home to the prisoner by any expression or act of his at the time of the shooting. "We cannot see that there was any time for deliberation, or that there was any premeditation; and especially we see no ground to assume that there was any consultation, or any concert of action among the four negroes. The prosecutor represents the reply of one of the negroes to his question, and the act of raising his gun, as almost simultaneous. It has the appearance of a sudden, hurried attempt to get the first shot, to avoid an apprehended attack. There could have been no time for consultation; nor can we see that there was that deliberation and premeditation necessary to make out the charge. We are not satisfied by the proof that the

defendant participated with that deliberate and premeditated intent which it is incumbent on the state to make out in such a case." *Nicholson, C. J.*

"To the criminative force of discourse expressive of an intention to commit an offence of the nature of that eventually committed," says Bentham, "the supposable facts that apply in the character of infirmative considerations are, in species and denomination, the same that have been seen applying in the case of preparations and attempts. But, forasmuch as words are apt to be uttered with less consideration than a course of preparation, attended with labor and hazard, is wont to be engaged and persevered in, the probative force of the criminative circumstance seems in general less considerable, and at the same time the disprobative force of the infirmative consideration more considerable. Being of the nature of confessional evidence, viz. of that species of it which is extra-judicial and spontaneous, differing only in respect of relative time (the confessional evidence being subsequent to the event, the evidence here in question antecedent), it stands exposed to the disprobative force of the same infirmative considerations as confessional evidence. If the state of things expressed in the former instance, by the words intention different *ab initio* be exemplified here, this is as much as to say, that the declarations that have place here (viz. the declarations of an intention to commit the crime that in fact was afterwards committed) were false. Supposing such to be the case, the inferences that may be drawn from them, and the infirmative considerations that apply to their probative

night;<sup>1</sup> where it was said: "I am determined to kill the man who injured me;"<sup>2</sup> where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased;<sup>3</sup> and where the language of the defendant was: "I will split down any fellow that is saucy."<sup>4</sup> Several considerations, however, have already been adverted to, which divert the applications of evidence of antecedent preparations, and which apply with equal force to this head.<sup>5</sup> In addition to these it is important to observe: 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misremembered. 2d. It does not necessarily follow, because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind. The words may have been uttered through bravado, or with a view of intimidating, annoying, extorting money, or other collateral objects. Thus a man, such as Dr. Parkman, may have frequently been the object of threats or curses of this kind from irritated tenants, and yet it was from a man who used neither that his death proceeded. 3d. Another person, really desirous of committing the offence, may have profited by the occasion of the threat, to avert suspicion from himself. An instance of this is given in the *Causes Célèbres*.<sup>6</sup> A woman of extremely bad character and violent temper, one day, in the open street, threatened a man who had done something to displease

force in the character of criminative circumstances, are the same as in the case of false extra-judicial and spontaneous confessorial evidence, or false responson.

"The supposition that these declarations are false may, at first view, be apt to appear inconsistent with the supposition all along made; viz. that the crime in question has actually been committed, and that by whom committed (or rather, whether committed by the supposed delinquent) is the only remaining subject of inquiry. But whether the crime actually committed by the supposition had or had not the supposed delinquent for a sharer in it, — the declarations made of an intention to commit a crime of that or a similar description

may, at the time when made, have been false; and declarations of an intention to commit a crime are no less susceptible of being false than declarations of the opposite cast, viz. declarations of an intention to abstain from the commission of that or a similar crime." Bentham's *Rat. Jud. Ev.* iii. 75.

<sup>1</sup> *Jim v. State*, 5 *Humphreys*, 146.

<sup>2</sup> *Com. v. Burgess*, 2 *Va. Cases*, 484.

<sup>3</sup> *Com. v. Smith*, 7 *Smith's Laws*, 697.

<sup>4</sup> *Res. v. Mulatto Bob*, 4 *Dallas*, 146.

<sup>5</sup> See as giving cautions on this point, *R. v. Hagan*, 12 *Cox C. C.* 311.

<sup>6</sup> 5 *Causes Célèbres*, 437.

her that she would "get his hams cut across for him." He was found dead a short time afterwards with his hams cut across. This was, of course, sufficient to excite suspicion against the female, who, according to the practice of continental tribunals at that time, was put to the torture, confessed the crime, and was executed. A person was, however, soon after taken into custody for some other offence, who confessed that he was the murderer; that, happening to be passing when the threat was uttered, he conceived the idea of committing the crime, as he knew the woman's bad character would be sure to tell against her. 4th. It must be recollected that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment.<sup>1</sup> By threatening a man you put him on his guard, and force him to

<sup>1</sup> "It is only, however, in the rudest and most lawless states of society that we now find this phase. In a community where there is a justice of the peace, to threaten life is followed by a binding over to keep the peace; and such a threat, therefore, is rarely heard except as a bluster. Civilization, it is true, has not extracted the venom from homicide, but it has silenced its rattle.

"There are cases, however, where the rattle is still heard. A purpose of vengeance may be whispered in a friend's ear. Among men over whom there is no law, in the mountain slopes or prairie sweeps to which no jurisdiction except that of the vigilance committee has reached; among the hunters of the wilderness who have preceded law, or the wreckers of the coast who have defied it, or the outcasts of the city who have been rejected by it; in those cases of domestic outrages where social usage seems to permit vengeance being taken into private hands, — here threats may be the precursors of deeds. Desperation, also, gives out the same warning; and in such cases the warning uttered is of real consequence.

"Then again a threat which may be meant merely as bravado may after-

wards become a real and desperate purpose. Provocation — opportunity — the desire to save the character from the imputation of mere bullying — may stiffen the attempt to frighten into an attempt to destroy. Or again, a settled animosity may be produced which may lead, though circuitously, to secret mischief.

"Taking out these exceptions, however, and assuming the case to be one of a man of ordinary prudence, where there is no proved settled purpose of revenge, and in a community where the usual restraints of the law are applied, it becomes very unsafe to connect threats previously uttered by such a party with a recent homicide. 'The tendency of such a prediction,' says Mr. Bentham, 'is to obstruct its own accomplishment.' In the case last put, it is not likely that the one who really accomplished a deed which would lead to condign punishment was the one who publicly threatened it." 1 Whart. & St. Med. J. § 775. But whatever may be the force of these considerations, the law is that all such evidence is admissible. When admitted, however, it is essential that its moral force should be carefully scrutinized. The presumption is one of *fact*, not *law*.

have recourse to such means of protection as the force of the law, or any extra-judicial powers which he may have at command, may be capable of affording him. Still, however, such threats, as observed by Mr. Bentham, "by the testimony of experience, are but too often sooner or later realized. To the intention of producing terror, and nothing but terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief, and, in pursuance of that intention, the mischievous act."<sup>1</sup>

Y § 694. *Threats by the deceased.* — Can evidence to the effect that the deceased, prior to the homicide, threatened the defendant's life, be received; and if so, is it a prerequisite to the proof of such threats that they should be shown to have been communicated to the defendant? Certainly, if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of a hostile demonstration by deceased, then it is irrelevant.<sup>2</sup> No man has a right to take another's life, if, by appealing to the law, he can avoid the encounter;<sup>3</sup> for if A. threatens B.'s life, and the threat is known to B., B.'s duty is to have A. arrested by due process of law, not to shoot him. On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declarations of either that the attack was one he intended to make. Threats to this effect by the defendant are always, as has been seen, admissible;<sup>4</sup> and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of threats by the deceased.<sup>5</sup>

<sup>1</sup> Quoted in Best on Presumptions, §15, to which several of the above illustrations and points are to be credited.

<sup>2</sup> *State v. Leonard*, 6 La. An. 420; *Myers v. State*, 38 Tex. 525; *State v. Mullen*, 14 La. An. 577; *Evans v. State*, 44 Missis. 762; *Hughey v. State*, 47 Ala. 97; *State v. Hays*, 23 Mo. 287; *Harris v. State*, 47 Missis. 318; *State v. Hall*, 9 Nev. 58.

<sup>3</sup> See supra, § 488, 536.

<sup>4</sup> See supra, § 689.

<sup>5</sup> *Stokes v. People*, 53 N. Y. 164;

*Collins v. State*, 32 Iowa, 36; *Cornelius v. Com.* 15 B. Monr. 539; *Rapp v. Com.* 14 B. Mon. 615; *Dupree v. State*, 23 Ala. 380; *Monroe v. State*, 5 Ga. 85; *Howell v. State*, 5 Ga. 48; *Scoggins v. People*, 37 Cal. 677; *People v. Shorter*, 4 Barb. 460; *S. C. 2 Comstock*, 197; *Com. v. Wilson*, 1 Gray, 337; *Patterson v. People*, 46 Barb. 625; *People v. Rector*, 19 Wend. 399; *Campbell v. People*, 16 Ill. 17; *Schnier v. People*, 23 Ill. 17; *Williams v. People*, 54 Ill. 422; *State v. Thawley*, 4 Harring. 562; *De Forest v. State*, 21

§ 695. Undoubtedly, it has frequently been held that to make the deceased's threats prior to the encounter admissible, they must be proved to have been brought to the knowledge of the defendant.<sup>1</sup> But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand, that his life was threatened, he should have applied to the law for redress; if he did not know, and was attacked without warning by the deceased, then proof of the deceased's hostile temper, whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A. (the defendant) or B. (the deceased) was the aggressor in the fatal collision is to be determined; and if in such case A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and if so with what motive, his prior declarations, uncommunicated to the defendant, are clearly evidence. And so it has been frequently held.<sup>2</sup> Of course it need

Ind. 23; *State v. Sloane*, 47 Mo. 604; *State v. Hays*, 23 Mo. 287; *State v. Keene*, 50 Mo. 359.

<sup>1</sup> *Powell v. State*, 19 Ala. 517; *Newcomb v. State*, 37 Missis. 383; *State v. Jackson*, 17 Mo. 544; *People v. Henderson*, 28 Cal. 465; *People v. Lombard*, 17 Cal. 316; though see *People v. Scroggins*, 37 Cal. 676; *Atkins v. State*, 16 Ark. 568; *Pridgen v. State*, 31 Tex. 420; *State v. Gregor*, 21 La. An. 473.

<sup>2</sup> *People v. Stokes*, 53 N. Y. 164; *Keener v. State*, 18 Ga. 194 (limited to cases of self-defence by *Lingo v. State*, 29 Ga. 470); *Hoye v. State*, 39 Ga. 718; *Pitman v. State*, 22 Ark. 574; *Campbell v. People*, 16 Ill. 17; *Pritchett v. State*, 22 Alabama, 39; *Cornelius v. Com.* 15 B. Monr. 539; *Little v. State*, cited Hor. & Thomp. Self-defence, 487; *State v. Goodrich*, 19 Vt. 116; *Holler v. State*, 37 Ind. 57; *Scroggins v. People*, 37 Cal. 677.

See *Lyon v. Hancock*, 35 Cal. 372; *Com. v. Andrews*, supra, § 627. In *People v. Stokes* (*ut supra*), Grover, J., in giving the unanimous opinion of the appellate court, said:—

“Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has, in fact, committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it. Had the deceased, just previous to his going into the hotel where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent upon the question whether he had in fact made the attempt.”

scarcely be added that all threats which are part of the *res geste* are *per se* admissible.

#### XVIII. INFERENCE FROM PRIOR ATTEMPTS OR OFFENCES.

§ 696. So far as concerns prior attempts by the defendant to kill the deceased, the law is the same as is just stated in reference to threats and preparations. So far as concerns the admissibility of other offences committed on other persons, to sustain the admission of evidence of such offences it is necessary to show, —

1. That the defendant did the act under trial; and unless sufficient evidence of this has been in the opinion of the judge received, all evidence of other offences, to prove intent, must be excluded. For it is a violation of the fundamental sanctions of our law to admit evidence that the defendant committed one offence, in order to prove he committed another.<sup>1</sup>

2. That the independent offence was committed by the defendant himself, or with his knowledge.<sup>2</sup>

3. That it was connected in character with that under trial.<sup>3</sup>

4. That it was not subsequent to the event under trial.<sup>4</sup>

§ 697. *Such evidence generally inadmissible unless there be such a connection between the offences as indicates the same perpetrator.* — The true distinction in this respect is happily illustrated in a case before the supreme court at Albany, in Septem-

when that question was litigated. And yet there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree.

"We are not aware of any decision of the precise question by the courts of this state, but there have been several in accordance with the above views in other states. *Keener v. The State*, 18 Georgia, 194; *Pritchett v. State*, 22 Alabama, 39; *Campbell v. People*, 16 Illinois, 17; *Cornelius v. Commonwealth*, 15 B. Monroe, 539. In *Jewett v. Banning*, 21 N. Y. 27, it was held that in an action for an assault and battery, alleged to have been committed by the defendant upon the plaintiff when no witnesses

were present, proof of previous ill will by the defendant against the plaintiff was competent as a circumstance tending to show the commission of the acts charged by the defendant. This accords with the view above taken. I think the testimony offered was competent, and the exception to its exclusion well taken. The error was one prejudicial to the accused by depriving him of the right to have competent testimony in his favor considered by the jury, and cannot be overlooked by the court."

<sup>1</sup> Whart. Cr. L. 7th ed. § 635 c, 640, 647, 647 a.

<sup>2</sup> Ibid. § 633 a.

<sup>3</sup> Ibid. § 633, 634, 649, 650.

<sup>4</sup> Ibid. § 647 a.

ber, 1868.<sup>1</sup> The defendant was charged with burglariously opening the barn of J. G. and stealing certain articles which were subsequently found on the defendant's boat, and in his possession. It was held to be erroneous to permit the prosecutor to prove that there were also found on the prisoner's boat other articles of property stolen from a third party, two or three weeks prior to the alleged burglary. "This testimony," said Peckham, J., "is loose and indirect—inconclusive and dangerous. The people might have properly shown the condition of things where this property was found, but they could not prove another felony unless it was so strongly connected with the felony charged as to prove, or strongly tend to prove, that the man who committed the one was guilty of the other. I remember a case of one Dunbar, tried for the murder of a boy in Albany County. It appeared that two little boys had been murdered the same afternoon and on the same farm—were left together about midday, and were killed that afternoon. One was found, within a few days, hanging in a tree; the other some distance off, on the same farm, killed by a flail and partly buried. There was other evidence tending strongly to show that the same person must have killed both. On the trial for killing the one found buried, evidence was offered and received that the nails in the prisoner's boots fitted precisely the marks made in climbing the tree where the other boy was found suspended. That testimony, I think, was clearly proper."

§ 698. On a trial for murder, the attorney general offered proof to show that the defendant had, some short time before the murder, set fire to the house of the deceased, in the night. The proof was offered for the purpose of proving the defendant to have been the perpetrator of the murder; but it was held that the proof was not admissible.<sup>2</sup> In the same case, however, proof was admitted showing that the defendant had beat his wife and forced her to abandon his house and seek refuge under the protection of the deceased. It was held that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and, therefore, proper proof of malice prepense on his part, and that the incidental abuse accompanying, and perhaps inducing

<sup>1</sup> Hall v. People, 6 Parker C. R. 671.      <sup>2</sup> Stone v. State, 4 Humph. 27.

the flight of the wife, was not such proof of a separate criminal charge as vitiates the verdict.<sup>1</sup>

§ 699. On the trial of an indictment for manslaughter, the record of a previous conviction of the defendant for an assault and battery upon the person of the deceased, and judgment thereon before her death, is admissible evidence to prove the fact of such conviction; but it is not evidence of an assault committed on the deceased, as alleged in the indictment for manslaughter, or that the assault stated in the record of such conviction is the same.<sup>2</sup>

§ 700. *Exception where acts form part of one transaction.* — When the acts form one transaction, the evidence is admissible.<sup>3</sup> Thus, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed and shortly before the killing, shot a third person, was held admissible under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction.<sup>4</sup>

§ 701. *Exception when quo animo is to be proved.* — Where the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or intent, is competent, notwithstanding they may constitute in law a distinct crime.<sup>5</sup> Thus where a prisoner was indicted as accessory before the fact to the crime of killing a person who had been actively engaged in ascertaining the perpetrators of a former

<sup>1</sup> Ibid. See *R. v. Edwards*, 12 Cox C. C. 230.

<sup>2</sup> *Com. v. McPike*, 3 Cush. 181.

<sup>3</sup> *Osborne v. People*, 2 Parker C. R. 583; *People v. Robles*, 34 Cal. 591; *Mason v. State*, 42 Ala. 543.

<sup>4</sup> *Heath v. Com.* 1 Rob. (Va.) 735. See *State v. Rash*, 12 Ired. 382; *Johnson v. State*, 17 Ala. 618; *Walters v. People*, 6 Parker C. R. 15; *R. v. Voke*,

*B. & R.* 531; *Whart. Cr. Law*, 7th ed. § 635.

<sup>5</sup> *Bottomly v. U. S.* 1 Story, 135; *Dunn v. State*, 2 Pike, 229; 2 Russ. on Crimes, 777; *People v. Hopson*, 1 Denio, 574; *R. v. Roebuck*, 36 Eng. Law & Eq. 631; *People v. Wood*, 3 Parker C. R. (N. Y.) 681; *R. v. Weeks*, Leigh & Cave, 18; *State v. Raymond*, 20 Iowa, 582; 1 Greenl. on Ev. § 53; *Wharton Crim. Law*, 7th ed. § 631-5.



murder, evidence of the guilt of the accused as to the former murder was held admissible for the purpose of showing motive as to the second murder.<sup>1</sup> So where the defendant and his sister were indicted for the murder of the sister's husband, with whom she had lived unhappily, it was held competent for the prosecution to offer evidence of an incestuous connection between defendant and his sister, existing some months prior to the murder.<sup>2</sup>

§ 702. *Exception where defendant sets up mistake.*— Suppose the defendant charged with maliciously shooting into a crowd, sets up accident as a defence. In such case, it would hardly be disputed that, to meet the defence of accident, it could be proved that he had on former occasions shot into crowds. So in poisoning cases, where the defence is mistake, the prosecution may rebut by showing that the defendant, on former occasions, administered the same poison with fatal consequences.<sup>3</sup>

#### XIX. INFERENCE FROM POSSESSION OF FRUITS OF OFFENCE.

§ 703. This, again, is a presumption of fact and not of law; and in its general bearings is fully discussed in another treatise. So far as concerns the particular issue before us, it is sufficient to say that it is always admissible to prove that the defendant had in his possession articles apparently taken from the person or custody of the deceased at the time of the latter's death.<sup>4</sup> A remarkable case of this kind occurred in Philadelphia, in 1845, on the trial of a German named Papenburg for murder. Towards the close of the case a handkerchief was accidentally drawn from a coat which it was proved he had worn on the night of the offence. On this handkerchief was pencilled, apparently in blood, the profile of a broken hatchet, with which it was proved the fatal blow must have been struck. Still this was dangerous evidence, deriving all its force from the improbability of the counter-presumption that the coat had been so placed between the homicide and the trial as to admit of the handkerchief being slipped in by a third person, — a feat which Boynton's case, hereafter stated, shows to be not unprecedented.

<sup>1</sup> *Dann v. State*, 2 Pike, 229. See *R. v. Roberts*, 1 Camp. 400.

<sup>2</sup> *Stout v. People*, 3 Parker C. R. 71, 132.

<sup>3</sup> See *infra*, § 736.

<sup>4</sup> Whart. Cr. Law, 7th ed. § 728; and see observations of Wells, J., in *Com. v. Sturtevant*, reported in the Appendix to this volume.

On a trial for murder, there having been evidence that the murdered woman had money, and that the prisoners had spoken of robbing her, the account of her administrator was, in Pennsylvania, held admissible to show that he found no money.<sup>1</sup>

<sup>1</sup> *Howser v. Com.* 51 Penn. St. 332.

Mr. Burrill (Circumstantial Evidence, pages 457-9) says: "In the last section, the effect of the recent possession of the fruits of crime was considered, so far as such possession was a visible one, capable of direct proof, and confirmed by actual identification of the objects found in possession. But such possession may also sometimes be inferred from observed circumstances. In most cases, the fruits of crime themselves are so well concealed from view by the perpetrator, as to furnish no immediate evidence against him. There is nothing visible in his possession, which can be directly traced to or connected with the offence. But they sometimes betray themselves by their consequences, as by a sudden and material change in life or circumstances, indicating beyond question the recent receipt of money or property from some quarter. Where a person, previously known to be poor, is found shortly after a robbery, larceny (*Commonwealth v. Montgomery*, 11 Metcalf, 534), or murder, in the possession of considerable wealth, it is always a circumstance of suspicion, and, when corroborated by others, of material weight in connecting the crime with its perpetrator. It is, generally, one of the earliest indicatory circumstances that are discovered, and, in several recorded cases, has had the effect of first attracting attention in the right direction, and affording the first available clew to the discovery of the offender. In the case of *Moses Drayne* (5 Lond. Leg. Obs. 123-125), A. D. 1654, where a traveller had been murdered at an inn for a sum

of money which he had with him, and had deposited with the innkeeper for safe keeping, it appeared in evidence that the ostler of the inn, who was at the time worth nothing of his own, shortly after the murder lent sixty pounds to a woman who kept an inn in the same town. It appeared also that the circumstances of the innkeeper himself had suddenly improved. For before the murder he was so poor that his landlord would not trust him for a quarter's rent, but would make him pay every six weeks; and he could not be trusted for malt, but was forced to pay for one barrel under another. But shortly after he bought a ruined malt-house and new built it; and usually laid out forty pounds in a day to buy barley. There was also observed upon a sudden a great change in his daughters' condition, both as to their clothes and otherwise; and if there was but a hood bought for one of the daughters, there was a piece of gold changed, and they were observed to have gold in great plenty. In the French case of *M. D'Anglade* (5 London Leg. Obs. 231, 233), A. D. 1687, it was proved that both the real criminals had suddenly, from a state of the lowest indigence, appeared to be in affluent circumstances; dressing in expensive clothing, and showing large sums of money; and that one of them had purchased an estate for which he had paid between nine and ten thousand livres.

"In the English case of *Rex v. Burdock* (see Best on Pres. § 196), a similar change in the prisoner's habits and mode of life was the circumstance which first led to suspicion and

## XX. INFERENCE FROM EXTRINSIC INDICATORY PROOF.

§ 704. In another work, inferences of this character, so far as concerns questions of identity, are examined at some length.<sup>1</sup> In connection with the points which are there developed, the student may well be referred to the trial of Dr. Webster, as reported by Mr. Bemis, as exhibiting in dramatic prominence several of the groups of facts which constitute the basis of inductions of this class.

It should be observed that indications such as these can always be permitted to go to the jury for what they are worth. Thus it was held admissible to put in evidence a memorandum made in pencil in the pocket-book of the accused, and this without proof of handwriting.<sup>2</sup>

§ 705. *Footprints and other marks on soil.*—The character of footprints leading to the scene of murder, and their correspondence with the defendant's feet, may be always, in cases when the defendant's agency is disputed, put in evidence.<sup>3</sup> Such evidence is not by itself sufficient to sustain a conviction.<sup>4</sup> But it is an item of circumstantial proof, proper for consideration as such.<sup>5</sup> Mr. Wills<sup>6</sup> says: "A farm laborer was tried for the murder of a young woman, a domestic servant living in the same service. A little before seven in the evening she went on an errand to take some harm to a neighboring house about two hundred yards distant, but it not being wanted she did not leave it, and set out about seven o'clock on her way back. Being about to leave her situation that evening, she had requested the prisoner

the subsequent discovery of the crime. And in the late New Jersey case of Peter Robinson (*State v. Robinson*, Middlesex (N. J.), oyer and terminer, March, 1841, Pamph. Rep. 11, 12, 18, 19, 22), the same circumstance was instrumental in leading to a similar result. It is to be observed, however, that this circumstance always requires to be corroborated by others; and, standing alone, is not considered a sufficient ground for putting a party on his defence. See Best on Pres. § 238; *Ibid.* § 33. It presents in itself merely a coincidence which, however natural or reasonable it may appear on the

supposition of the guilt of the party indicated, is nevertheless capable of more or less satisfactory solution and explanation, on suppositions entirely consistent with his innocence."

<sup>1</sup> 2 Wh. & St. Med. Jur. (1873) § 287, 1218.

<sup>2</sup> *Whaley v. State*, 11 Georg. 123; Wharton Crim. L. 7th ed. § 696.

<sup>3</sup> *Campbell v. State*, 23 Alab. 44; *Com. v. Pope*, 103 Mass. 440.

<sup>4</sup> *R. v. Britton*, 1 F. & F. 354.

<sup>5</sup> See remarks of Wells, J., in *Com. v. Sturtevant*, Appendix.

<sup>6</sup> *Circum. Ev.* p. 122.

to carry her box to the gardener's house, about a quarter of a mile distant. Soon after she set out on her errand the prisoner followed her carrying her box, but did not reach the gardener's cottage until after eight. On the following morning she was found lying on her back, drowned in a shallow pit near a footpath leading from her master's house to the gardener's cottage. There were marks of violence on her person, and one of her shoes and the jug in which she had carried the barm were found near the pit. Barm was also found spilt near the spot, and there were marks of much trampling, and chaff and grains of wheat were scattered about, which were material facts, the prisoner having been engaged the day before in threshing wheat. Impressions were found in the soil, which was stiff and retentive of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the prisoner's dress. The prisoner denied that he had seen the deceased after she left the house on her errand, and stated that he had been, in the interval before his arrival at the gardener's house, in company with an acquaintance whom he had met with on the road; but it was proved that the person referred to at the time in question was at work thirty miles off. He was convicted and executed."

§ 706. *Description of scene of guilt.*—When there is an inspection of the scene of guilt, it must be shown what changes, if any, have taken place since the guilty act.<sup>1</sup>

§ 707. *Inculpatory instruments.*<sup>2</sup>—In *Ruloff's case*, decided in New York, in 1871, the conviction rested in a large measure on the production of implements found in the prisoner's room, and on photographic likenesses of the deceased. The applicatory law is thus clearly stated by Judge Allen: "Objection was made, upon the trial, to the production in evidence of certain implements and papers found in the room and desk of the prisoner. Both the room and desk were used somewhat in

<sup>1</sup> *State v. Knapp*, 45 N. H. 148. As to view by jury of premises, see *Wh. C. L.* 7th ed. § 8161. As to diagram, see *State v. Jerome*, 33 Conn. 265.

<sup>2</sup> *Supra*, § 690. See as to instrument of death, *supra*, § 671-3; and as to poisons, *infra*, § 729.

common by him and one of his associates, but he was the chief occupant. The articles were taken some time after his arrest, and evidence was given tending to show that he had the key of the room, and showing how the room had been kept during his absence; and the prisoner, upon the trial, admitted the possession of one of the implements. Other evidence was given, also tending to connect the prisoner with the articles found in his room, and the question of fact was properly submitted to the jury upon that question. The ratchet-drill, which, it was claimed, the bits with which the entry into the store was effected fitted, the prisoner admitted on the trial had been in his possession as a new invention and a curious thing. This alone was some evidence that the articles found with the drill were there while the prisoner occupied the room and used the desk, especially with the other evidence tending to show that the room had remained locked from the time he left until the articles were found and taken away."

§ 708. *Photographs.* — In Ruloff's case, just cited, Judge Allen said: "Objection was also taken to the admission of the photographic likenesses of the two persons found drowned. Evidence was given of the manner in, and disadvantageous circumstances under which they were taken; and the evidence was that they were not artistic pictures, nor in all respects the most perfect likenesses that could be taken. This was fully explained by the artist, and the reasons why they were not more perfect stated. They were submitted to the witnesses, not as themselves, and alone sufficient to enable them to identify the persons with entire certainty, but as aids, and with other evidence, to enable the jury to pass upon the question of identity. They were the best portraits that could be had, and all that could be taken. The persons were identified by other circumstances, the clothes they wore and the articles found upon their persons, and their general description; and the photographs were competent, although slight, evidence in addition to the other and more reliable testimony. We are of the opinion that it was not error, under the circumstances, to admit them as evidence for what they were worth. By themselves, they would have been of but little value; but they were of some value as corroborating the other evidence identifying the bodies. There was no error of substance committed upon the trial; and the judgment must be affirmed, and

the proceedings remitted to the court below, to proceed upon the conviction and pronounce sentence of death as prescribed by law."<sup>1</sup>

So in a remarkable case, decided finally in Pennsylvania in 1874,<sup>2</sup> Agnew, C. J., said: "The great question in the case was the identity of A. C. Wilson as W. S. Goss. This was established by a variety of circumstances and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Baer's Woods was that of Goss. All the bills of exceptions except one relate to this question of identity, the most material being those relating to the use of a photograph of Goss. Many objections were made to the use of this photograph, the chief being to the use of it to identify Wilson as Goss, the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or miniature painted from life, and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. Letters from Wilson, identified as the handwriting of Goss; a peculiar ring belonging to Goss, worn upon the finger of Wilson; the recognition by Wilson of A. C. Goss as his brother; packages addressed to A. C. Goss, and envelopes bearing the marks of the firm with which W. S. Goss had been employed, coming and going to and from Baltimore, and many other circumstances following up the man Wilson, leave no doubt of his identity as Goss, independently of the photograph. The objection to the proof of Goss's habits of intoxication is equally untenable. True, the habit is common to many, and alone would have little weight; but habits are a means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury. It is unnecessary to follow the bill of exceptions in detail. They all relate to facts and circumstances as to the question of iden-

<sup>1</sup> *Ruloff v. The People*, 6 Hand (45 Albany L. J. 50; and Whart. & St. N. Y. R.), 213-25 (Allen, J. 1871); Med. J. ii. § 1231. As to fallibility S. C. 5 Lansing, 261; and see also of photographs, see *Popular Science Monthly*, April, 1875, p. 710.  
<sup>2</sup> *Udderzook v. Com.* See Appendix.

tity. If the bills of exception are many, they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof. They are many links in a chain so long that it encircles the prisoner in a double fold. The questions put to G. P. Moore, A. H. Barintz, and A. R. Carter were unobjectionable. Whether they really would not identify the dark and swollen face of the corpse, it was not for the court to decide. The weight belonged to the jury. There was no error in permitting the jury, after their return into the court for further instructions, to take out with them, at their own request, the teller's check, due-bill, and applications for insurance papers, which had been proven, read in evidence, and commented on in the trial. The appearance, contents, and handwriting of these documents were no doubt important to be inspected by the jury, who could not be expected to carry all these features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offence."

§ 709. But photographs, while sometimes giving an unmistakable likeness of the object photographed, often, as is a matter of ordinary experience, completely fail in this respect. Photographs of the dead, in particular, are open to this criticism. Of physical scenery, photographs are still less reliable, depending much on the conditions of light and shade under which they were taken. Thus in the Tichbourne perjury case, the defence put in evidence a photograph of a "grotto," the character of which was involved in the issue; and this photograph was so unreliable as to invoke the severe criticism of the court. But the question of accuracy is for the jury: the photograph, if proved to be fairly taken from the disputed object, is clearly admissible.<sup>1</sup>

#### XXI. INFERENCE FROM ATTEMPTS AT ESCAPE.

§ 710. When a homicide is committed, and a suspected person attempts to escape or evade justice, it may be argued that he does so from a consciousness of guilt; and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which

<sup>1</sup> See *Morse's Famous Trials*, 167.

guilt may be inferred. Hence it is admissible for the prosecution to show that the prisoner advised an accomplice to break jail and escape;<sup>1</sup> or that he offered to bribe one of his guards;<sup>2</sup> or that he killed an officer of justice when making such attempt;<sup>3</sup> or that he attempted to bribe or intimidate witnesses.<sup>4</sup> So with flight, to which no proper motive can be assigned, and with the acts of disguise, concealment of person, family, or goods, and many other *ex post facto* indications of mental emotion.<sup>5</sup> But it must be remembered that while these acts are indicative of fear, they may spring from causes very different from that of conscious guilt.<sup>6</sup> "Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive facts, will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defence, or to bring witnesses from a distance to establish it; he may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him; add to all this, more or less vexation must necessarily be experienced by all persons who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive."<sup>7</sup> The question, it cannot be too often re-

<sup>1</sup> *People v. Rathbun*, 21 Wend. 509; *Byles on Bills*, 449; *Fanning v. State*, 14 Mo. 386.

<sup>2</sup> *Whaley v. State*, 11 Geo. 123.

<sup>3</sup> *Revel v. State*, 26 Geo. 275.

<sup>4</sup> See *People v. Pitcher*, 15 Mich. 397; *State v. Staples*, 47 N. H. 113.

<sup>5</sup> *Mittermaier*, *Deutsch. St. sect.* 12; *Fanning v. State*, 14 Mo. 386; *People v. Pitcher*, 15 Mich. 397.

<sup>6</sup> *Wills on Circumstantial Evidence*, 70; 1 Wh. & S. *Med. Jur.* (1873) § 805.

<sup>7</sup> *Best's Evidence*, 5th ed. 578.

Dr. Thomas Fuller gives the following quaint excuse for running away from London when charged with treason:—

"And if any tax me as Laban taxed Jacob, 'Wherefore didst thou flee away secretly, without taking solemn leave?' I say, with Jacob to Laban, 'Because I was afraid.' And that plain dealing patriarch, who could not be accused for purloining a shoe latchet of other men's goods, confessed himself guilty of that lawful felony that he 'stole away' for his own safety; *seeing Truth may sometimes seek corners, not as fearing her cause, but as suspecting her judge.*" *Truth Maintained*, Letter V.

See also Lord Clarendon's letter to the house of lords explanatory of his leaving England when under impeachment, and the reasons given by him



peated, is simply one of inductive probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say, that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred; nor should this be done without a general statement of the countervailing considerations which a comprehensive view of the question induces. It was in rightful recognition of this that Mr. Justice Abbott, on the trial of Donnell for the murder of Mrs. Downing, observed in his charge to the jury, that "a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight."<sup>1</sup> So it is proper to keep in mind the influence which might have been exerted upon the accused, by the character of the tribunal before whom, and the mode of criminal procedure in the country where the trial is to take place.<sup>2</sup> Hence is it that conduct exhibiting indications of guilt should not be received by the court, unless there be satisfactory evidence that a crime has been committed.

§ 711. For the same purpose, confusion, prevarication, and embarrassment on the defendant's part, when charged with the crime, may always be proved;<sup>3</sup> though it is not admissible for him to show that several days after the *corpus delicti* was discovered, he appeared surprised when it was announced to him.<sup>4</sup> But it should always be remembered how delusive this species of evidence is. "Blushing" has been declared to be an evidence of guilt; but many guilty men never blush at all, and some innocent men would blush at the mere idea that they are being looked at to see if they are blushing.<sup>5</sup> "Terror" also has been noticed; but nervousness is not always an incident of guilt, nor the absence of nervousness always an incident of innocence. "Confusion" is just as likely to mark the deportment of an innocent person, unused to be made a public spectacle, as that of a

why a man unjustly accused should evade meeting an unscrupulous prosecution. Compare Lister's Life of Clarendon, ii. 415 *et seq.*

<sup>1</sup> Trial of Robert Saule Donnell, London, 1817.

<sup>2</sup> Best on Presumptions, p. 322; Tyner v. State, 5 Humphreys, 383. See Whart. Cr. L. 7th ed. § 745.

<sup>3</sup> See Com. v. Goodwin, 14 Gray, 55; 1 Whart. & S. Med. Jur. (1873) § 805.

<sup>4</sup> Campbell v. State, 23 Ala. 44.

<sup>5</sup> See Mr. Best's observations on this point in the 7th ed. of his Evidence, p. 583.

guilty person inured to such exposure. "I do not think," says Judge Learned, in charging the jury in *Lowenstein's case*:<sup>1</sup> "much reliance is to be placed upon the manner of any man when he is suspected or accused of crime. I mean whether he looks pale or flushed, or the like, for it is impossible for us to tell how a man may act when he is accused of crime. Our own judgment in that is not very reliable. One of you may appear to me flushed or frightened and to another not so. Therefore I do not think much reliance is to be placed upon the opinion of witnesses as to manner. I don't speak of conduct, but as to manner."

§ 712. The defendant will not be permitted to give evidence to account for his flight unless the prosecution prove the flight as tending to establish guilt;<sup>2</sup> nor can he show that he refused to avail himself of an opportunity of flight.<sup>3</sup>

§ 713. Evidence of subsequent public excitement to justify an anticipation of violence after a homicide, and thus rebut a presumption of guilt from flight, is admissible, but the excitement must exist before the flight.<sup>4</sup>

#### XXII. INFERENCE FROM CORRUPTION OR FORGERY OF EVIDENCE.<sup>5</sup>

§ 714. This, again, is an inference of inductive reasoning to be drawn from certain facts, which for this purpose are admissible in evidence. Yet, supposing such a forgery of evidence to be proved, it is important to keep in mind Mr. Bentham's criticism, that the motives from which it springs may be various. These motives Mr. Bentham groups as follows: 1. From a view of self-exculpation; 2. Maliciously, with the intention of injuring the accused, or others; 3. In sport, or in order to effect some moral end.<sup>6</sup>

<sup>1</sup> Pamph. Albany, 1874, p. 331.

<sup>2</sup> *State v. Hays*, 23 Mo. (2 Jones) 287.

<sup>3</sup> *People v. Rathbun*, 21 Wend. 509; *Campbell v. State*, 23 Alab. 28; *Com. v. Hersey*, 2 Allen, 173; *Gardiner v. People*, 6 Parker C. R. 155.

<sup>4</sup> *State v. Phillips*, 24 Mo. (3 Jones) 475; *Golden v. State*, 25 Geor. 527.

<sup>5</sup> See, on this point, *Amos's Great Oyer*, &c. 267.

<sup>6</sup> "As well in the case of real evi-

dence as in the case of written evidence, forgery is susceptible of one main distinction — into fabricative and oblitative. The case where, in the employment of expedients of this kind, the endeavor of the criminal is simply to remove the imputation from himself, without seeking to fasten it on anybody else, is as common as the other case is rare. Whatever be the crime, a main object of the endeavor of the criminal is of course to expunge, as effectually as possible, all traces of

§ 715. *With a view to self-exculpation.* — A striking illustration of this is found in the trial of Dr. Webster for the murder of Dr. Parkman, where letters were received by the police marshal of Boston, purporting to reveal the location of the body, which upon the trial were proved to have been written by the prisoner, in order to divert suspicion from himself, and to prevent a rigid examination of the premises where the murder was actually committed.<sup>1</sup> In Caravan's case,<sup>2</sup> the suggestion of a false defence was one of the facts which made up the proof of the defendant's guilt. Under this head also may be mentioned a forged defence of *alibi*. It is not an uncommon artifice to endeavor to give coherence and effect to a fabricated *alibi*, by assigning the events of another day to that on which the offence was committed; so that the events, being true in themselves, are necessarily consistent with each other, and false only as they are

the commission of it. The hands, the garments of the murderer, have they received a stain from the blood of the deceased? The most obvious reflection suggests the removing of the stain from everything from which it can be removed, and the destroying or hiding anything from which it cannot be removed. To superinduce upon any object an appearance, the tendency of which shall be to disprove the commission of the crime, — whether by disproving the existence of the criminal act or some criminative circumstance, or by proving the existence of some justificative, or extenuative, or exemptive circumstance, — an artifice of this tendency would suppose an ulterior degree of refinement, and would come under the denomination of fabricative forgery of real evidence.

"As it is only through the medium of physical facts that psychological facts can be brought to view, it is, consequently, through the medium of physical facts alone that any deceptive representation of psychological facts can be conveyed. Physical facts alone, and not psychological facts, are the only one of the two sorts of facts

upon and in respect of which forgery can, properly speaking, be committed, to which the operations indicated by the term forgery can bear any direct and immediate application.

"As to physical facts: although, among the several modifications of which real evidence of the evanescent kind is susceptible — evidence consisting of motions, sounds, colors, smells, tastes, and (if the word may be used) touches — there is not perhaps a single article that has not, at one time or other, been taken for the subject of that sort of deceptitious operation which, applied to other subjects, has received the name of forgery; yet it is among the modifications of permanent real evidence that we are to look for that modification of forgery which is most in use, most readily apprehended, and most apt to present itself under that name." Bent. Rat. Jud. Ev. iii. 50.

<sup>1</sup> Bemis's Rep. of Webster case, 210. See on same point, *Gardiner v. People*, 6 Parker C. R. 155; *Edmund's case*, 1 Wh. & St. Med. J. § 167.

<sup>2</sup> Reported in 2 Wh. & St. Med. Jur. 3d ed. § 1192.

applied to the day in question.<sup>1</sup> And any kind of corruption or forgery of evidence may be shown as contributing to the inferences of guilt.<sup>2</sup>

§ 716. Yet here again we must remember that this is a kind of subterfuge to which an innocent but weak man is almost as likely to resort as is an experienced rogue.<sup>3</sup> Frequently an innocent man, sensible that, although guiltless, appearances are against him, and not duly weighing the danger of his being detected in clandestine attempts to stifle proof, has endeavored to get rid of real evidence in such a way as to avert suspicion from himself, or even to turn it on some one else. A case to the point is mentioned by Sir Edward Coke: <sup>4</sup> "In the county of Warwick," says he, "there were two brethren; the one having issue a daughter, and being seised of lands in fee, devised the government of his daughter and his lands, until she came to her age of sixteen years, to his brother, and died. When she was about eight or nine years of age, her uncle for some offence correcting her, she was heard to say, 'Oh, good uncle, kill me not!' after which the child, after much inquiry, could not be heard of; whereupon the uncle, being suspected of the murder of her, the rather for that he was her next heir, was, upon examination, anno 8 Jac. Rep., committed to the jail for suspicion of murder, and was admonished by the justices of the assize to find out the child, and thereupon bailed until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, he took another child, as like unto her both in person and years as he could find, and apparelled her like unto the true child, and brought her to the next assizes, but upon view and examination she was found not to be the true child; and upon these presumptions he was indicted, found guilty, had judgment, and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to school, ran away into the next county; and being well educated, she was received and entertained of a stranger; and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly

<sup>1</sup> Wills on Circumstantial Evid. 116; State v. Williams, 1 Williams (Vt.), 724.

<sup>2</sup> State v. Collins, 20 Iowa, 86; State v. Staples, 47 N. H. 113.

<sup>3</sup> Toler v. State, 16 Ohio S. R. 583; State v. Brown, 25 Iowa, 561.

<sup>4</sup> 3d Inst. 104, p. 232.

proved to be the true child.”<sup>1</sup> Mr. Bentham also gives a pointed illustration of a case of this kind, taken from the Arabian Nights’ Entertainments, where the body of a man who had died by accident in the house of a neighbor was conveyed by him, under the apprehension of suspicion of murder, in the event of the corpse being found in his house, into the house of another, who, finding it there, and acting under the influence of similar apprehensions, in like manner transmitted it to a third, who in his turn shifted the possession of the corpse to a fourth, with whom it was found by the officers of justice.<sup>2</sup>

§ 717. *With the intention of injuring the accused or others.*— So it may be that the forgery of real evidence has been effected either with the purely malicious intent of bringing down suffering upon an innocent person, or with the double motive of self-exculpation and of inducing suspicion on another. A familiar instance of this is where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with a view of exciting suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in like manner.<sup>3</sup> Of this character was a case which occurred a few years ago in Mississippi. A young man named Boynton had

<sup>1</sup> Wills on Circumstantial Evidence, 113.

<sup>2</sup> On an ejectment involving large estates in Ireland, the question being whether the plaintiff was the legitimate son of Lord Altham, and therefore prior in right to the defendant, who was his brother, it was proved that the defendant had procured the plaintiff, when a boy, to be kidnapped and sent to America, and on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder; it was held that these circumstances created a violent presumption of the defendant’s knowledge of title in the plaintiff; and the jury were directed that the suppresser and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper

evidence; that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and they might expect satisfaction from him that his brother died without issue. Craig on dem. of Annesley v. Earl of Anglesea, 17 St. Tr. 1416; and see the Tracy Peerage, 10 C. & F. 154; Clunnes v. Pezzy, 1 Camp. 8; Lawton v. Sweeny, 8 Jurist, 984; 1 Greenleaf’s L. of Evidence, § 87; Wills Circumstantial Ev. p. 72.

<sup>3</sup> Theory of Pres. Proof, App. Case 10, p. 102; and see illustrations cited in Wh. Cr. L. 7th ed. § 718.

been for some days staying at the house of a friend on a plantation on the Mississippi River. One morning the deceased, the master of the house, was found murdered in a rice brake ; by his side were seen Boynton's pistols, and in Boynton's hat, in the room where he was then sleeping, was found a paper which was known to have been a short time before in the pocket of the deceased. On this evidence Boynton was convicted and executed ; persisting to the end in his ignorance of the perpetrator of the act, and breaking wildly from the sheriff when the hour of execution arrived, proclaiming his innocence with an earnestness that shook the confidence of the bystanders in his guilt. Not many months after, a man, who had been prowling about the neighborhood at the time, was arrested, tried, and sentenced in another state for a murder subsequently occurring ; and when at the gallows he confessed that he had been the perpetrator of the murder for which Boynton had suffered ; that he had taken the pistols from Boynton's pillow, and had in return placed a paper from the dead man's pocket in Boynton's hat. And one of the most dramatic illustrations of this kind of forgery is to be found in Udderzook's case, reported in the Appendix to this volume. Goss, a brother-in-law of Udderzook, had his life insured ; and in order to recover from the insurers, Goss's shop was set fire to, a dead body being previously placed in it to represent Goss. The insurers, suspecting the fraud, refused to pay the insurance ; and Udderzook, who was one of the concoctors of the insurance, took steps to hide Goss so as to prevent an explosion of the plot. Finding it difficult to keep Goss out of view, he finally killed him.

§ 718. To the same point is a trial related by Mr. Bentham, where the officers of justice were accused of having altered a common key, found in the possession of the defendant, into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess.<sup>1</sup> A singular case is given in the *Causes Célèbres*, of a Flemish curate, Francis S. Reimbauer, charged with the murder of Anna Eichstader, by a girl named Catharine Frauenknecht, residing in the house with him at the time. In answer to her evidence, which seemed conclusively to point to him as the guilty individual, he replied by a counter statement, designating the

<sup>1</sup> 3 Benth. Jud. Ev. 60.

lena, then dead, as the murderess, ical with those given by Catharine, ought to substantiate his statement of his acquaintances endeavoring to prove that Magdalena had, during her trial. Notwithstanding the detection of the evidence, he managed his cause with success, after it had been prolonged for years. He underwent *one hundred* examinations, and was convicted of the murder only upon his own con-

SESSION OR DESTRUCTION OF EVIDENCE.

"destruction of pertinent evidence,"  
"is always a prejudicial circumstance of great weight; for as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is."<sup>2</sup> Thus one of the most prejudicial facts in the trial of Captain Donnellan was that he had rinsed the phials from which Sir Theodosius Boughton had taken the draught which was alleged to have caused his death.

<sup>1</sup> 5 Causes Célèbres, 442.

<sup>2</sup> Starkie's Evidence, vol. i. p. 437. As to spiriting away witnesses, see *State v. Barron*, 37 Vt. 57.

"No system of established procedure is yet known that does not afford instances, — instances in greater numbers than an eye of sensibility can contemplate without concern and apprehension, — where individuals, really innocent, have sunk under a load of imputation heaped upon them by fallacious circumstantial evidence. Suppose an article of this description, pregnant with false inferences, — an article exhibiting appearances susceptible of permanence, — the dagger employed by a murderer conveyed into the pocket of an innocent man; the garment of an innocent man stained, by design or accident, with blood from

the body of a man who has been murdered. Suppose the innocent man detected in his endeavors to rid himself of the dagger, to wash away the blood: the dagger, the blood, fallacious as they are, are, notwithstanding, evidence; these endeavors, innocent as they are, will accordingly be, in appearance at any rate, and in a certain sense in reality, forgery of real evidence.

"The case of the unfortunate Calas affords an exemplification of more than one of the incidents by which the conclusiveness of an inculpatory presumption may be proved. A son of his had received a violent death from his own hands: the father was brought to trial on a charge of murdering the son. As far as the confusion of mind into which he was

§ 720. In the case of Donnell, already adverted to, a fact of the same kind was offered in evidence. The deceased was supposed to have been poisoned by the prisoner; and the contents of the stomach, which had been placed in a jug for examination, were clandestinely thrown by him into a vessel containing a quantity of water. The prisoner was acquitted on the ground of the insufficiency of the evidence of the *corpus delicti*; but besides the tampering with the contents of the stomach, evidence was given of other suspicious facts and declarations, strongly indicative of conscious guilt.<sup>1</sup>

§ 721. So it was an important item of proof in Dr. Webster's case, that he removed or destroyed, by extraordinary effort, articles whose existence could only be prejudicial to him on the supposition that in some way they were to be traced to the deceased.

§ 722. A boatman was tried at Warwick Spring Assizes, 1836, before Mr. Justice Bosanquet, for stealing a quantity of rum, which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham. The carrier's agent at Liverpool, as was his custom, had taken a sample of the spirit, and tested its strength. Upon the delivery at its place of destination, the spirit was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the consignee, went to the boat where the prisoner was, to require explanation; but, as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke the jars

plunged permitted, he had obliterated or changed some of the appearances about the body of the deceased, and other circumjacent bodies: here was forgery of real evidence. On his examination, he denied some of the facts by which the non-naturality of the death was indicated: in this mode, as in the former, he concealed — not indeed the fatal act itself, the act by which the process of strangulation was effected (for in that he had neither part nor privy), but some of the evidentiary facts by which it was indicated: here was clandestinity.

To what end all these aberrations from the line of the truth? — to cover guilt? — no; for there was none anywhere. The object was to save the reputation of his departed child, and thereby the reputation of the family, from the ignominy which, had the direct truth been known, would (he was but too well assured) be stamped upon it by a most mischievous and endemial prejudice." Bentham's Rat. of Jud. Ev. iii. 54.

<sup>1</sup> The Trial of Robt. Saule Donnell, Wills Circum. Ev. 103.



and emptied their contents, which by the smell were proved to be rum, into the canal. The prisoner was convicted.<sup>1</sup>

§ 723. In the great number of poison cases so industriously collected by Hitzig,<sup>2</sup> there is hardly one in which it was not attempted, by the premature interment of human remains, to smother the offence, the pretext being that this is rendered necessary by the state of the body. In the case of violent death, and especially when caused by poison, it cannot but be known that the *post-mortem* examination will always furnish important, and generally conclusive information, as to the cause of death.<sup>3</sup> In one strange case, the presumption arising from a hurried burial was sought to be rebutted by the antedating the time of death, and a most ingenious but perilous net-work of letter and funeral notices was spread while the deceased was still in full health. He stumbled unawares upon his own funeral paraphernalia, and was fortunately able, not only to read the mourning notes, but to prevent their necessity. Dr. Hitzig gives in full the trial of a woman who, under the pretext of a family custom, was enabled to attend no less than seven precipitate interments in her own immediate household, no one suspecting that the usage which she thus so rigorously followed was but a trick to cover the violent death of victims whom she appeared so tenderly to lament. Illustrations to the same effect are to be found in the Pennsylvania trials of Chapman and Earle for poisoning. So powerful, in fact, was the working of remorse and fear of exposure, as to lead a guilty mother, — such was the strong tendency of the evidence in a case not reported, — after strangling her own child, to change it for a living one in a neighboring dormitory, and to insist upon her maternal relations to the latter with the utmost pertinacity.

§ 724. Yet here, also, when a defendant is prejudiced by proof of his forging evidence, it must be remembered that however much his character for candor may suffer by such proof, it is entitled to but little weight as a substantive evidence of guilt. If a cause is to be condemned because its advocates have forged evidence in its support, Christianity would have to be condemned,

<sup>1</sup> R. v. Thomas, Reported Wills Circum. Ev. 75.

<sup>2</sup> See *Traité des Examinations Juridiques*, par MM. Orfila et Lesuer;

<sup>3</sup> Nene Pitaval, von Dr. J. C. Hitzig und Dr. W. Haring.

Wills Circum. Ev. 105.

for in behalf of Christianity innumerable writings have been forged. Given a true cause, a desperate assailant, and an advocate who believes the end justifies the means, and falsehood will be resorted to to prove the truth. Indeed there are few cases in which passions are involved in which the temptation to strain if not fabricate evidence is not irresistible. Few cases of disputed succession or legitimacy, for instance, are tried, in which suspicious evidence is not introduced on both sides ; yet one of these sides has the right. So is it eminently in criminal issues. A is found dead, apparently murdered ; and B. and C. are charged with killing him. B. who is a man of weak character, is innocent of the murder ; but thinks that if he succeeds in destroying all the proof of the *corpus delicti* his acquittal will be sure. He attempts this (*e. g.* attempts to burn up the dead body, or to make way with other indicatory proof of a violent homicide), and attempting it unsuccessfully, the attempt is a strong article of evidence against him. B., a shrewd villain, if he makes the attempt, makes it successfully.

#### XXIV. DISTINCTIVE INFERENCES IN MARITAL HOMICIDES.

§ 725. Among the circumstances from which malice, in a killing by a husband of his wife, may be inferred, are the following : —

Adultery by either husband or wife, illustrating a desire to get rid of the marital relation ;<sup>1</sup> bigamy by the husband ;<sup>2</sup> long ill-treatment ;<sup>3</sup> misconduct leading to a suit against him by his wife to compel good behavior.<sup>4</sup> So where A., a husband, after an absence, during which he was believed to be dead, returned and found his wife married to B., and B., after an altercation, and partial reconciliation, shot A. ; the facts of the marriage, absence, second marriage, and quarrel were held admissible to prove malice.<sup>5</sup>

§ 726. On an indictment against the defendant for the murder of his wife, where the killing was shown to have taken place on the 8th of July, a witness who had lived near the defendant for

<sup>1</sup> State v. Rash, 12 Ired. 382 ; Templeton v. State, 27 Mich. 501.

<sup>2</sup> State v. Green, 35 Conn. 203. See supra, § 690.

<sup>3</sup> State v. Langford, Busbee, 436 ; Stone v. State, 4 Humph. 27 ; McCann v. People, 3 Parker C. R. 272 ; State

v. Watkins, 9 Conn. 49 ; State v. Green, 35 Conn. 203. See supra, § 690.

<sup>4</sup> People v. Williams, 3 Parker C. R. 84. See supra, § 690.

<sup>5</sup> Com. v. Smith, 7 Smith's Laws, Appen. ; 2 Wheel. C. C. 80. See supra, § 410.

about six months, ending the last of May, was offered to prove that while witness had lived there, the prisoner had had frequent difficulties and altercations with his wife. It was held, that the evidence was admissible as tending to show want of affection, and as justifying the jury in inferring that the same state of mind continued after the witness moved away. It was also ruled that evidence was admissible on the question of motive, to show that about six months before the homicide, the wife made a complaint against her husband for an assault, on which he was held to bail.<sup>1</sup> In a similar case, it was held that it was competent for the government to show, that some time before the alleged killing the wife had complained of her husband as a disorderly person, and that he was adjudged to pay two dollars weekly for her support.<sup>2</sup>

#### XXV. DISTINCTIVE INFERENCES IN POISONING.

§ 727. "In the case of death by poisoning," says Mr. Greenleaf,<sup>3</sup> "it is not necessary to prove the particular substance or kind of poison used; nor to give direct and positive proof what is the quantity which would destroy life; nor is it necessary to prove that such a quantity was found in the body of the deceased. It is sufficient, if the jury are satisfied from all the circumstances, and beyond reasonable doubt, that the death was caused by poison administered by the prisoner.<sup>4</sup> Upon the latter point the material questions are, whether the prisoner had any motive to poison the deceased — whether he had the opportunity of administering poison — and whether he had poison in his possession, or power to administer. To these inquiries, every part of the prisoner's conduct and language in relation to the subject are material parts of the *res gestæ*, and are admissible in evidence."<sup>5</sup>

§ 728. *Presence of poison in body.* — It is said by a learned writer that "on the view of a body after death, on suspicion of poison, a physician may see cause for not positively pronouncing

<sup>1</sup> *McCann v. People*, 3 Parker C. R. (N. Y.) 272. See also *State v. Watkins*, 9 Conn. 49; *State v. Green*, 35 Conn. 203.

<sup>2</sup> *People v. Williams*, 3 Parker C. R. (N. Y.) 84.

<sup>3</sup> 3 Ev. § 135.

<sup>4</sup> *R. v. Sawwell*, cited Wills on Cir. Ev. 180.

<sup>5</sup> See the observations of Buller, J., in *Donnellan's case*; of Abbott, J., of Rolf, B., and of Parke, B., cited in Wills on Circum. Ev. 187-191; see also *R. v. Geering*, 18 Law Jour. 215. In *Blackburn v. State*, 23 Oh. St. 146, "administering" poison was held to include, "persuading to take."

that the party died by poison ; yet if the party charged be interested in the death ; if he appears to have some preparation of poisons, without any probable just motive, and this secretly ; if it be in evidence that he has in other instances brought the life of the deceased into hazard ; if deceased has discovered an expectation of the fatal event ; if that event has taken place suddenly, and without previous circumstances of ill health ; if he has endeavored to stifle inquiry by precipitately burying the body, and afterwards, on inspection, signs agreeing with poison are observed, — though such as medical men will not positively affirm could not have been owing to any other cause, — the cumulative strength of circumstantial evidence may be such as to warrant conviction ; since more cannot be required than that the charge should be rendered highly credible, from a variety of detached points of proof ; and that, supposing poison to have been employed, stronger demonstration could not reasonably be expected to have been, under all circumstances, producible.”<sup>1</sup>

Yet in such case, unless the evidence of the *corpus delicti* be overwhelming, the court should not permit a conviction.<sup>2</sup> If the expert testimony renders it doubtful whether the deceased was or was not poisoned, a conviction cannot be sustained even on the defendant's confession.<sup>3</sup>

In Scotland a conviction is recorded in a case where a servant girl had mixed some poisonous matter with gravy, and Dr. Christison was led to suppose that poison had been swallowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce ; though he said that this probability was strengthened by the fact that the violence of the symptoms was in proportion to the quantities of the suspected food taken.<sup>4</sup> More recently Taylor lays down the principle, that while the chemical investigation should never be omitted, yet the detection of poison in the body by means of the chemical analysis is not essential, but the offence will be sufficiently proved if established by the concurrent evidence of the symptoms

<sup>1</sup> 1 Gilb. on Evidence, by Lofft, p. 302.

<sup>2</sup> See fully 2 Wh. & St. Med. Jur. 3d ed. § 323 ; and see *State v. Wharton*, cited Taylor's Med. Jur. by Reese, Jur. 1.

25 ; *Com. v. Schoeppe*, cited Taylor's Med. Jur. by Reese, 25.

<sup>3</sup> *Pitts v. State*, 43 Missis. 472.

<sup>4</sup> *Wills Cir. Evid.* 180. See 33 Am. Jur. 1.

of the disease, the marks upon the body after death, and other inferential testimony.<sup>1</sup> Guy lays peculiar stress upon chemical investigations, and discovery of poison, if corroborated by other proofs derived from symptoms and marks upon the body.<sup>2</sup> Puccinotti places no reliance on the pathological observations, and on the chemical ones only when all the conditions above cited are fulfilled.<sup>3</sup> And there are cases in which poison (*e. g.* anti-mony) may be utterly eliminated from the body before death.<sup>4</sup>

§ 729. *Inference from possession of poison by defendant.*—Poison may be possessed by the defendant either in its manufactured state, or it may be prepared by him. In such case we may expect to find leaves from which poison could be concocted, drugs peculiarly or exclusively suited for the purpose of adulterating food, &c., or receptacles inclosing anything of the kind, materials for preparing weapons, &c. It is to be inquired in such cases, for what use the accused was in the habit of making these materials, and whether he was familiar or acquainted with the criminal purposes to which they might be made subservient. Under this head also would properly be considered the purchase of poisons under the pretence of employing them for the destruction of vermin, and the question would naturally arise, were they so employed? A female convicted at the Warwick summer assizes, August, 1821, of the murder of her uncle by poison, alleged that she had bought arsenic to poison mice, and pointed to a mouse which she said had been killed by it, whereas it was found that the mouse had not died from poison.<sup>5</sup>

§ 730. *Inference from position of deceased.*—In cases of poisons which act instantaneously, some light may be thrown on the question by the position of the body. Thus Mr. Amos,<sup>6</sup> tells us of a trial in which the hypothesis of suicide was defeated by the fact, that while the united result of medical experience is that prussic acid produces *instantaneous* death, the deceased was found with a *corked* bottle in her hand, from which five drachms had been taken, and with the bedclothes composed about her person with elaborate precision.<sup>7</sup>

<sup>1</sup> Taylor, 159. See 2 Whart. & St. Med. Jur. 3d ed. § 321 *et seq.*

<sup>2</sup> Guy's For. Med. iii. 404–407.

<sup>3</sup> Puccinotti, 222, 253.

<sup>4</sup> See Lancet, Aug. 4, 1860, p. 119;

*R. v. Palmer*, cited in Taylor's Med. Jur. by Reese, 101.

<sup>5</sup> *R. v. Higgins*, 14 Lond. Med. Gaz. 896; and see *supra*, § 707.

<sup>6</sup> Great Oyer, 347.

<sup>7</sup> See 2 Whart. & St. Med. Jur. 3d

ed. § 321 *et seq.*

§ 731. *Inference from conduct of suspected parties.* — In cases of poisoning it becomes important to inquire, in seeking for the probable criminal, whether any party in the range of suspicion procured poison, particularly of the kind which probably proved fatal, shortly before the death of the deceased ; whether such person was acquainted with the preparation of poisons ;<sup>1</sup> whether he forced himself into contact with the deceased, or out of the sphere of his usual duties or habits tried to administer meat or drink to the deceased. It may, under such circumstances, be important to go far back for the purpose of discovering who prepared the meats or had access to the dishes, and such evidence is clearly admissible. There are many cases where it may not be out of place to inquire whether any members of the deceased's family were observed unaccountably to abstain from the dishes previously poisoned, particularly if it belonged to the usual meal of the family, or was a favorite dish of the deceased ; whether there was any attempt to prevent others from partaking of them or to dissuade the deceased from abstaining from them ; and very particularly, whether there was any effort to prevent a *post-mortem* examination, or to hide or destroy any remaining portions of the food or drink of which the deceased partook, or any of the vessels containing them ; or whether there was an effort to throw unreasonable obstacles in the way of the employment of a competent physician during the illness of the deceased. It is to be observed, in concluding this subject, that the more nearly the poison found in the body corresponds with that purchased or prepared by the prisoner the more vivid does the suspicion become.<sup>2</sup>

<sup>1</sup> See, on this point, *infra*, § 735.

<sup>2</sup> 2 Mitter. Deut. St. § 124.

"Of all the great poisoners, the most stealthy and feline, we have been told, was the widow Zwanziger, known in history by the name of her last husband, the Privy Councillor Ursinus, of Berlin. Madame de Brinvilliers was an enthusiast, who poisoned with a spread and dignity of circumstances which necessarily invited detection. The widow Zwanziger, on the other hand, slid softly about from house to house, poisoning unobtrusively. So quiet and home-like were her atten-

tions to the deceased — so deep and yet so well controlled her grief — so completely her whole deportment that of a tender, sober, and yet undemonstrative friend, that when her lover, who began to be tired of her — her husband, of whom she began to be tired — her aunt, whose heir she was — successively sickened and died, she was the last who would have been suspected of having dispatched them. Yet this most experienced, self-disciplined, and wary of poisoners — this actress so consummate, that to the end she played the

§ 782. *Proof of poison in remains should not be received without proof of identity of remains.* — It must be remembered that the

parts of the lady of fashion, and the sentimental and pietistic poetess with a perfection that showed no flaw — was careless enough, when engaged in such common game as the poisoning, as if merely to keep her hand in, of an ordinary man-servant — to leave the arsenic open in a room where her intended victim, made curious by one or two abortive operations she had attempted on him, scented it out, carried it to a chemist, and established the fact that it was of the same character with the poison by which she had seasoned some prunes she had been giving to him for dessert." 1 Wh. & St. Med. J. § 783.

"At the Shrewsbury races, in November, 1856, appeared two young men, each of whom had large stakes involved — in each case those of life and death. 'Polestar,' one of the horses entered, belonged to John Parsons Cook, a sporting character and spendthrift, and not much besides. He had inherited a considerable estate, but a large portion of this had gone in dissipation, and now, the result of the race was to decide whether the remnant was to be doubled or destroyed. Watching him pretty closely, though with an off-hand familiarity which required an experienced eye to penetrate, was William Palmer, a man several years his senior, whose fortune, which had also been considerable, was now entirely gone. The 'Chicken' was Palmer's horse, and on this he had ventured enormous bets. But he had a double game. Ruin, it is true, was imminent, but there was a method of escape. He was a medical man, and he had discovered the fatal properties of strychnine — how that it produced a disease scarcely to be distinguished from lock-jaw — how it could be ad-

ministered without exciting the victim's attention — what was the minimum dose necessary to take life, and how, when this dose alone was administered, the poison was dispersed, leaving no traces behind. He had a book in which these points were stated, and to make himself certain, he not only turned down the book at the place, but made a memorandum giving the substance in his note-book. He was a man of the world, and he made himself, without appearing to do so, thoroughly master not only of Cook's confidence, but of his secrets. He knew that Cook had a disease which produced sores on the tongue which might be considered, if talked about in the right light, as the cause of lock-jaw, so he proceeded to tell about them in this light. He knew how to imitate handwriting. So he wrote a paper by which Cook acknowledged himself his debtor in a sum sufficient to absorb all Cook's effects. 'Polestar' won and 'Chicken' was beaten. Palmer, in his careless, sporting way, borrowed Cook's winnings to pay his losses. Then everything was ready to poison Cook, and the work was done with complete coolness and success. A little preliminary sickness was induced, during which nothing could be more kind and yet less officious than Palmer's attentions. It is true the strychnine had to be bought, but this was done in a circuitous way, and under a false color. Then it had to be administered, but two medical men, of undoubted probity, were called in, and as they recommended pills, it was very easy to substitute pills of strychnine for pills of rhubarb. So Cook was killed, and this so subtly, that the attending physician gave a certificate of apoplexy. As to the *post-mortem*,

mere presence of poison in a dead body does not prove the *corpus delicti* unless it be shown (1) that the remains were those of the deceased, and (2) that these remains had not been tampered with by strangers, and that the examination had been conducted in such a way as to exclude the hypothesis of the poison being introduced after exhumation.

Hence in a Virginia trial for homicide by poisoning, the omission to prove directly that the body analyzed was that exhumed was properly held fatal to the prosecution.<sup>1</sup>

Palmer knew it would not amount to much, nor did it. No strychnine was discovered, but here the nerves of Palmer gave way. He showed an undue fidgetiness while the examinations were going on. He tried to tamper with the vessels in which the parts to be examined were placed. Then, also, the note he produced to show Cook's indebtedness to him was suspected; and then Cook's betting book could not be found. This led to Palmer's arrest. The first medical authorities in England proved that Cook's death came from strychnine and nothing else. The apothecaries from whom the strychnine was bought, attracted by the discoveries, identified Palmer. In a dark passage he had been seen to drop something into a glass for the sick man, but the passage was not so dark but that he was observed. Then his note-book turned up, showing how acquainted he was with the poison. And upon these facts, skilful as he was, and completely as he had covered up his guilt from the superficial eye, he was convicted and executed." 1 Whart. & St. Med. Jur. § 774.

<sup>1</sup> Taylor's Med. Jur. by Reese, 27; Com. v. Lloyd, tried at Leesburg, Oct. 30, 1872. The defendant was tried for the murder of her infant child, Maud. Delphi Lazenbury was a mulatto girl employed in Mrs. Lloyd's house at and previously to the time of Maud's death, and she was the first witness called

for the prosecution; before she testified, however, the prosecuting attorney asked that Mr. R. G. Clowe be excluded from the jury as a person prejudiced and therefore unfit to serve in such a capacity, he having on the foregoing day asserted that Mrs. Lloyd was an old love of his, and that he would not hang her if she were to murder every friend he had in the world; but this motion was overruled by the court, and Delphi Lazenbury's testimony was proceeded with. It was mainly to the effect that Maud, apparently well, had eaten a cake and had soon after become ill and vomited, dying two days afterwards; during Maud's illness she had taken nothing but milk and lime-water, and what the child had vomited had been thrown into the yard by her mother; the doctor had been sent for on Saturday night, shortly after the child had become sick; Delphi knew nothing of the purchase of arsenic or of any being in the house; Mrs. Lloyd had had four children, whose names were George, Henry, Anne, and Maud. At this point the jury were sent from the room pending the discussion of a point of law raised by the defence against the propriety of the admission of evidence calculated to implicate the prisoner in the death of her other children. The court reserved its decision, and Delphi was recalled to give the important testimony that she had



§ 738. *Duration of working of poison.*<sup>1</sup>— We may rest satisfied in this respect with the determination of our own law, that

never smelt anything burning about the house. Dr. A. R. Mott was then called and testified that he had been Mrs. Lloyd's family physician since 1865; had attended Maud in her last illness; she complained of pain in her bowels, and he administered calomel and opium then, and on the next day he gave her bismuth, opium, lime-water, and milk; was present at the *post-mortem* examination; prepared the stomach; sealed it in a glass jar to be sent to Professor Tonry to be analyzed; he decidedly believed that Maud did not die of arsenical poisoning, but had never seen a death from that cause; had thought her death caused by congestion of the stomach, but the *post-mortem* showed him to have been wrong. Delphi was recalled, and testified that on the 28d of March the undertaker swore that he buried and was present at the exhuming of Maud. Then followed testimony to show that the bottle produced in court was that into which the child's stomach and intestines had been placed, and the next witness was Professor Tiffany, Demonstrator of Anatomy in the Maryland University and Surgeon of the Baltimore Hospital. In May last he had examined certain bodies in the presence of Professor Tonry and others; had seen them exhumed; one of them was in a coffin marked "Maud Lloyd;" body was much decomposed, and before making an incision into it he sprinkled carbonate of lime, a disinfectant, on the face and neck; from a cut in the abdomen he took the liver, spleen, and kidneys, a portion of the duodenum, and some

fluid, put them into a jar which he sealed and gave to Professor Tonry.

"The court decided that unless the prosecution could prove that the child's stomach had been kept safe by Mr. Bentley, no analysis of it could be introduced as evidence. Mr. Bentley was dead, and, as no such evidence was to be had, the prosecution had to confine itself to the analysis of those parts of the body which had been taken care of by Professor Tiffany, and so a most important link in the testimony had to be dropped, for it could not be shown that Mr. Bentley had kept the stomach carefully and untouched before it came into Professor Tonry's hands. Professor Tonry was then called to testify as to the results of his analysis of the liver, spleen, kidneys, &c., after which the Professor swore that in the parts of the body taken from the coffin marked 'Maud Lloyd,' he had taken eight-tenths of a grain of arsenic. On his cross-examination it was admitted by him that arsenic was sometimes found in bismuth, although in most minute quantities. Dr. Mott, recalled, stated that he had used bismuth from the same jar from which that given to Maud was taken, but had never heard of any ill effects from its use. Professor Womley and Professor Mallett, Analytic Chemists at the University of Virginia, testified that the methods and processes used by Professor Tonry to discover poison were, in their judgment, entirely proper, and such as would be used by good analytical chemists. This practically closed the case for the prosecution, although

<sup>1</sup> See on this subject Amos' Great Oyer, 347; and see also discussion in 2 Whart. & St. Med. J. *in loco*.

no conviction shall take place unless the death occurs within a year and a day from the injury received.<sup>1</sup>

some testimony was taken to show that the property of Mrs. Lloyd's children amounted to about \$1,500 and the estate of her husband to about \$2,800.

"The defence then opened with its witnesses, calling first Dr. Graham G. Ellzey, a graduate of New York University, who believed that though Professor Tonry's method of analysis was correct so far as it went, it did not go far enough. A hypothetical case was put to him in the defence, in which its view of Maud's symptoms was portrayed, and he was asked whether, in his judgment, a person who died with such symptoms died of arsenical poisoning. He replied that he should not think so, because the same symptoms were sometimes found in ordinary diseases; had not, however, seen or heard of a case in which the symptoms were precisely like those of the hypothetical one spoken of. Dr. Taylor, coroner of the city and analytical chemist, then testified to the same effect as Dr. Ellzey, but thought the hypothetical case had some superficial signs of poisoning with arsenic; the symptoms of such poisoning given by the writers on medicine are so various that almost anything might be expected. Dr. Pierce B. Wilson sworn: Had been an analytical chemist for fourteen years, and had studied under Bunsen and Liebig; his experience in determining the weight or quantity of arsenic in a substance precluded the possibility of Professor Tonry being correct in the quantity he found; believed the Professor had found more terchloride of arsenic than was present; would not have permitted the use of carbolate of lime about the body unless he knew

it to be absolutely pure; commercial carbolate of lime was not really a chemical, being crude in its preparation; the knives used in the *post-mortem* examination should have been new, for if a small portion of arsenic acid had dropped from them on the liver or kidneys examined by Professor Tonry, it would have given him his results. . . . Here the defence wished to show eight-tenths of a grain of arsenic to the jury, but the judge said that the quantity had nothing to do with the case, nor would he require the state to show a fatal quantity; the question was of the presence and not the quantity of arsenic in the remains examined. Mr. Matthew then testified that he had been living in Dr. Mott's shop for over eight months, and that a stranger might have tampered with articles kept there. Dr. Ellzey recalled: Had got bismuth from Dr. Mott's store, and had on examination found arsenic in it. There were hundreds of diseases in which the symptoms are those of poisoning by arsenic. Would not express an opinion in the hypothetical case until he found how arsenic got into the patient's body, but if he suspected nothing, should not regard the case as one of poisoning; but if arsenic was found after death, and shown to have got in the body before death, should say the person in whom it was found had been poisoned. More but unimportant testimony of similar drift was then taken. An attempt was then made by the defence to criminate Delphi Lazenbury as one who had much to do with the children, but the judge promptly excluded all testimony to this effect. Testimony of Fenelon Slack

<sup>1</sup> See *supra*, § 15.

§ 784. *Duration of sickness as indicating poison.* — It has been laid down by medical writers that certain poisons have a stated time to run, and that unless the deceased's illness corresponded with such period, the inference of poisoning is negatived. But the conflict of expert testimony on this point is too great to sustain any definite conclusion; and if it should appear that the defendant was poisoned, and died of poison, the length of his illness, within the limitation above given, is immaterial.<sup>1</sup>

§ 785. *Inference of malice in poisoning.* — Malice, in poisoning cases, depends upon two conditions. First, the design must be wickedly to take life or inflict bodily hurt. A physician may administer a dangerous medicine either discreetly or negligently.

and Joel L. Nixon was then taken as to the character of the prisoner, and was to the effect that she was a kind and loving mother. The defendant was acquitted under the charge of the court." Newspaper Report.

The acquittal in this case, in view of the fact of the imperfect identification of the remains, was properly directed by the court.

The same difficulty as to the proof of the *corpus delicti* in the trial of Mrs. E. G. Wharton, was commented on in 2 Whart. & St. Med. Jur. Part I. § 328, 495.

In a case of great interest, which for several years agitated the community by its extraordinary and dramatic vicissitudes, Dr. Paul Schoeppe, a young physician of Carlisle, Pennsylvania, was charged with the poisoning of Miss Maria Steinecke, a woman of seventy years and of good fortune, to whom he was engaged to be married. Her death occurred on January 27, 1869, and shortly after her death Schoeppe produced what was claimed to be her last will, giving him her entire estate. Her body was then exhumed by direction of her relatives, and the remains were submitted to Professor Aiken for inspection, and were declared by him to exhibit traces

of prussic acid. Schoeppe was indicted for her murder in Carlisle, and after a rapid trial (conducted under a strong public excitement against him) was convicted of murder in the first degree. A writ of error was refused by the supreme court. He was sentenced to be hung, but just before the execution a reprieve was granted by Governor Geary. A law was then passed by the legislature, intending to cover his case, so that it might be reopened and heard. It was vetoed by the governor, but finally passed over his veto, and the case was again taken to the supreme court, but again that tribunal refused to interfere.

An election taking place for presiding judge in Cumberland County, in October, 1871, the judge before whom Schoeppe had been convicted was defeated, partly on this issue, and Judge Junkin elected in his place. In the winter of 1871-2, a new statute was passed by the legislature, under which a new trial was had in Carlisle, in September, 1872. The defendant was acquitted, after a charge from Judge Junkin which is reported in the New York Herald of September 9, 1872.

<sup>1</sup> R. v. Russell, cited in Taylor's Med. Jur. by Reese, 99. See 2 Wh. & St. Med. Jur. § 321 *et seq.*

In the first case, where the drug is administered in order to save life, and the patient, notwithstanding that the physician exercises the diligence usual to good physicians in his circumstances, dies from the medicine, there is no criminal liability. In the second case, where the drug is administered negligently, and the patient dies of the drug, the person administering the drug is guilty of manslaughter.<sup>1</sup> To constitute malice, therefore, in order to convict of murder, there must be an evil intent to take life, or inflict some grievous bodily harm. But this is not all. There must be a knowledge of the dangerous character of the poison, and it must be actually dangerous. A. may administer a supposed enchanted but innocent potion to B., with intent to kill B.; but this will not be administering poison. On the other hand, when the poison is known by the defendant to be deadly, his administering it without proper medical advice is strong proof of malice.<sup>2</sup> Thus a nurse who knowing the deadly effect of poison administers to a child enough of it to kill, may be properly convicted of murder.<sup>3</sup> If the poison be administered negligently, the case is manslaughter.<sup>4</sup>

§ 736. *Other poisonings admissible to rebut defence of accident.* — On a trial for poisoning, is it admissible to prove prior poisonings perpetrated by the same defendant? On the first glance, the answer would be emphatically in the negative, unless such poisonings were so closely connected in time with that under trial as to be substantially part of the *res gestæ*. It is grossly unjust to the defendant to try him for one crime when charging him with another. It is destructive of all the forms of Anglo-American jurisprudence to embarrass the issue by the introduction of evidence of any other crime than that which the indictment specifies, and which the defendant has had no notice to meet. And to this effect was the ruling of the superior court sitting at New Haven, Connecticut, in April, 1872, on the trial of Mrs. Lydia Sherman, charged with the murder of her husband, Horatio N. Sherman. The prosecution proposed at the outset to prove that Horatio N. Sherman died on the 12th of May, 1871, from arsenical poisoning, and then proposed to put on the stand witnesses

<sup>1</sup> R. v. Martin, 3 C. & P. 211. See <sup>2</sup> State v. Leak, 1 Phil. (N. C.) L. supra, § 42, 387. 450.

<sup>3</sup> 2 Hale, 455; 2 Wheel. C. C. 18; <sup>4</sup> Ann v. State, 11 Murph. 159; supra, § 42. See as to causal connection, supra, § 387.

to prove a series of three similar poisonings, with similar effects, alleged to have been perpetrated by the defendant in her immediate family within the two years prior to the death of Horatio N. Sherman. The evidence was rejected by the court, for the reason that it put the defendant on trial for other crimes than that charged in the indictment.<sup>1</sup>

■ § 737. The same result, on an issue of a similar nature, was reached by the supreme court of Pennsylvania in 1872. "To make," said Judge Agnew, in giving the opinion of the court, "one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner, to compel him to acquit himself of two offences instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offences charged against him, and of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt."<sup>2</sup>

§ 738. This reasoning, limiting it to the immediate stage of the case in which the evidence was offered, is unanswerable. To have permitted the several prior poisonings to be introduced by the prosecution in a bunch at the outset, would have created four or five issues instead of one, and would have subjected the defendant to the hardship of being tried, as to all of these issues but one, without any prior notice by which he could prepare for his defence. But suppose that the defendant, conceding the fact that

<sup>1</sup> See case reported in 1 Whart. C. P. F. Smith) 60. See also *People v. L.* 7th ed. § 685 c.

Doyle, 1 Mich. 221; *Farrer v. State*,

<sup>2</sup> *Shaffner v. Com.* 72 Penn. St. (22 2 Ohio St. 64.

the deceased was poisoned, set up as a defence that the poisoning was accidental. Would it then be competent for the prosecution to prove in rebuttal that several prior poisonings had taken place in the same household within a short time previous? When we recollect that the rule, in regard to passing forged money, has always been to meet the defence of accident by just this sort of evidence, we are compelled to answer the question immediately before us in the affirmative. So, indeed, has it been twice held in England. Thus Maule, J., when ignorance of the poisonous character of a "white powder" was set up as a defence, admitted evidence of the prior administering, by the defendant, of the same powder to another person who died.<sup>1</sup> And in a much later case, upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her, and occasionally tasted her food, showed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.<sup>2</sup>

<sup>1</sup> *R. v. Dossett*, 2 Car. & K. 306.

<sup>2</sup> *R. v. Garner*, 4 F. & F. 346. Mr. Stephen (*Criminal Law*, p. 308), in discussing this point, says: "Four indictments against a woman for poisoning her husband and two of her sons by arsenic, and for administering arsenic with intent to murder another son, being presented at one assize, evidence as to the administration of the arsenic to the three sons was tendered on the trial for poisoning the husband,

though the sons were poisoned some months after the husband's death. It was admitted, on the double ground that the similarity of the symptoms proved that the husband died of arsenic, and that the recurrence of the same event proved that it was not accidental. *R. v. Geering*, 18 L. J. M. C. 215. The case of *R. v. H. E. Gardner*, at Lincoln Lent Assizes, was very similar to this."

## CHAPTER XXI.

### DYING DECLARATIONS.

General grounds of admissibility, § 742.	Deceased must have been competent as a witness, § 759.
Evidence does not conflict with constitutional limitation, § 743.	Infants, § 759.
But cannot be received to prove facts distinct from homicide, § 744.	Infidels, § 760.
Such facts may be received to sustain declarant's mental capacity, § 745.	Infamous persons, § 761.
Declarations of dying persons not admissible as to another's death who was simultaneously killed, § 746.	Mental incapacity, § 762.
Declaration must be under a solemn sense of impending dissolution, § 747.	Evidence must have been admissible had deceased been sworn, § 765.
Yet this may be inferentially shown, § 748.	Matters of opinion, § 765.
No objection that medical attendant had hope, § 749.	Declarations reduced to writing, § 766.
Expressions indicating belief in impending death, § 750.	Admissible without these limitations when part of the <i>res gestæ</i> , § 767.
Even a faint hope excludes, § 754.	Admissibility is for the court, § 768.
Need not have been immediately before death, § 755.	Are to be examined and impeached by same tests as are applicable to evidence ad- duced on trial, § 769.
Prior declarations may be affirmed immediately before death, § 756.	Inadmissible if clearly fragmentary, § 770.
Only admissible when death is the subject of the charge, § 757.	No objection that questions were leading if deceased spoke intelligently, § 771.
Admissible from husband against wife, and vice versa, § 758.	Substance may be proved, § 772.
	Character of deceased for truth may be impeached, § 773.
	Jury to judge of credibility, § 774.
	Admissible when in defendant's favor, § 775.

§ 742. *General grounds of admissibility.*—The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are admissible in prosecutions for killing the person making the declarations: (1) though the prosecution be for manslaughter;<sup>1</sup> and (2) though the accused was not present when they were made, and had no opportunity for cross-examination;<sup>2</sup> and they may be received either against or in favor of the party charged with the death.<sup>3</sup>

<sup>1</sup> State v. Hanna, 10 La. An. R. 181.

<sup>2</sup> See 1 Phil. Ev. 223; 1 Stark. Ev. 101; People v. Green, 1 Denio, 614;

1 Park. C. C. 11; State v. Brunetto, 13 La. An. 45, and cases hereafter cited.

<sup>3</sup> See *infra*, § 775.

For it is argued that when an individual is in constant expectation of immediate death, all temptation to falsehood, either of interest, hope, or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice.<sup>1</sup> Yet, in dealing with this kind of evidence, one or two preliminary cautions should be observed. Passions and prejudices, which in life pervert the perceptive faculties, do not always lose their power on the death-bed. Had Napoleon I., when dying, been asked as to the cause of his disease, he would have been as likely, when recovery was hopeless, to lay the blame on Sir Hudson Lowe, as he had been to make this charge in the early stages of his sickness. A man who believes himself pursued by enemies, and who is accustomed to impute to those enemies the evils he suffers, is not sure to break from this custom at a time when his intellect is enfeebled, and delusions increase rather than abate. Ganganelli, a man of eminent integrity, charged, when dying, his illness to Jesuit conspiracies; Ricci, general of the order, whose integrity was equally high, made, when dying, the most solemn deposition that to his knowledge Ganganelli's statements were unfounded. It should be remembered that cross-examination, when a witness is produced in court, gives a process by which delusions can be dissipated. But no such process exists by the death-bed. The witnesses who catch up these statements are generally friends of and sympathizers with the dying man, eager to encourage and preserve any remarks he may drop, no matter how incoherent or feverish, which may vindicate him, or implicate a common object of hate; nor by such witnesses is it likely that questions would be asked as to the grounds of the declarant's belief. Nor can it always be said that the consciousness of the near approach of death is an equivalent to an oath administered on the witness stand. A witness sworn in court knows that he may be con-

<sup>1</sup> 1 Leach, 502; 1 Gilb. Evid. 280; *v. Lee*, 17 Cal. 76; *People v. Ybarra*, 1 Chit. C. L. 568, 569; *Com. v. Murray*, 2 Ashm. 42; *Com. v. Williams*, Texas, 579; *Hill v. State*, 41 Ga. 484; *Ibid.* 69; *Brown v. Com.* 78 Penn. St. 321; *State v. Nash*, 7 Iowa, 347; *State v. Scott*, 12 La. An. R. 274; *Donnelly v. State*, 2 Dutch. (N. J.) 463; *Walston v. Com.* 16 B. Monr. 15; *People v. Lee*, 17 Cal. 76; *Benavides v. State*, 31 Mich. 105; *State v. Oliver*, 4 Houst. 585; *People v. Davis*, 56 N. Y. 95.



victed of perjury if he testifies falsely. A dying man, if he believes in a future retribution, will speak, if his faculties are unimpaired, under a similar sanction; but all dying men do not retain their faculties unimpaired, nor do all dying men believe in a future state of retribution. Convicts on the scaffold have, as a class, as little hope of reprieve as any persons on the eve of death; yet there is no kind of evidence so unreliable as the last speeches of convicts on the scaffold. The weight, therefore, to be attached to dying declarations depends upon these conditions: (1) The trustworthiness of the reporters; (2) the capacity of the declarant at the time to remember accurately the past; and (3) his disposition truly to tell what he remembers. It is true, that by statute in most of our states, disbelief in a future retribution no longer disqualifies a witness; and that it is consequently held in such states that such disbelief does not affect the admissibility of dying declarations. It is true, also, that the law is that the court is required, as will presently be seen, to admit the declarations if the deceased would have been competent as a witness, and if he spoke under a consciousness of approaching dissolution. But when the declarations are received, their credibility and weight are for the jury; and in view of the exceptional character of the testimony, and its liability to perversion, it is proper that it should be carefully exposed to each of the tests just enumerated.<sup>1</sup>

§ 748. *Evidence does not conflict with limitation of constitution.* — The constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common law principle that the declarations in *extremis* of the murdered person, in such cases, are admissible in evidence.<sup>2</sup>

§ 744. *But such declarations cannot be received to prove facts distinct from and prior to homicide.* — Dying declarations are admitted from the necessity of the case, to identify the prisoner, to establish the circumstances of the *res gestæ*, and to show the transactions from which the death results; when they relate to former and distinct transactions they do not come within the

<sup>1</sup> See *Walker v. State*, 37 Texas, 265; *Campbell v. State*, 11 Georgia, 367.

<sup>2</sup> *Woodsides v. State*, 2 How. Miss. (N. S.) 131; *State v. Nash*, 7 Iowa R. 655; *Anthony v. State*, 1 Meigs, 347; *Miller v. State*, 25 Wisc. 384.

principle of necessity.<sup>1</sup> Therefore it seems that dying declarations by a party that the prisoner had, two or three times previously, attempted to kill him, are not admissible.<sup>2</sup> And so when they go to show old malice on part of the prisoner to the deceased.<sup>3</sup>

§ 745. *But may be received to sustain declarant's mental capacity.*— Yet it is competent to detail collateral remarks, on the part of the declarant, made at the time of the uttering of the declarations as to the homicide, when such collateral declarations tend to sustain the declarant's mental capacity. Thus, in a case in the supreme court of New Jersey, in 1857, Chief Justice Green said: "If it be true, as was proved by experts called by the defence, that the injury sustained by the deceased was calculated to derange the mental faculties, it was competent for the state to meet the objection *in limine*, and to show by his acts and words that he was laboring under no hallucination, and that his mental faculties were unimpaired."<sup>4</sup>

§ 746. *When two persons are alleged to have been killed at the same time, through the same agency, the dying declarations of one are not admissible in a prosecution for the homicide of the other.*— Whether, when it is alleged that A. and B. were mortally wounded at the same time, by the same agency, the dying declarations of A. are admissible on the trial of C. for killing B., has been the subject of some conflict of opinion. The admissibility of such declarations has been affirmed by high authority,<sup>5</sup> but elsewhere, and with good reason, denied.<sup>6</sup> For if the restriction, confining such declarations to the utterances of the party whose death is charged in an indictment, be removed to this extent, it would render admissible the dying declarations of all persons whose death occurred in the same general transaction as that in which the deceased died. The dying declarations of

<sup>1</sup> *R. v. Mead*, 2 B. & C. 605; *R. v. Hind*, Bell C. C. 258; 8 Cox C. C. 300; *Johnson v. State*, 17 Alab. 618; *Ben v. State*, 37 Alab. 103; *State v. Shelton*, 2 Jones N. C. 360. *Leiber v. State*, 9 Bush, 11.

<sup>2</sup> *Nelson v. State*, 7 Humph. 542.  
<sup>3</sup> *Mose v. State*, 35 Alab. 421; though see *Donelly v. State*, 2 Dutcher (N. J.), 463, 601.

<sup>4</sup> *Donelly v. State*, 2 Dutcher, 496.

<sup>5</sup> *State v. Wilson*, 23 La. An. 558; *State v. Terrell*, 12 Rich. (S. C.) 321; *R. v. Baker*, 2 M. & R. 53; the last two being cases of poisoning.

<sup>6</sup> *Brown v. Com.* 73 Penn. St. 321; *State v. Fitzhugh*, 2 Oregon, 227. See *Hudson v. State*, 3 Cold. (Tenn.) 335; *Hackett v. People*, 54 Barb. 370. See *infra*, § 757.

persons killed in great as well as in little riots, for instance, would become competent testimony; and, in prosecutions for riotous homicide, the case would be flooded by the last words of men who, from their participation in the common excitement, are almost the last who should be received as witnesses without the solemnity of a trial, or the criticism of a cross-examination. For it should be remembered that the agonies of death, while they often bring gravity and conscientious carefulness to persons dying under a solitary and exceptional blow, tend only to intensify the partisan sympathies of those sacrificed with others, as they suppose, on behalf of a common cause in whose passions they are steeped. So, in cases where it is alleged that a number of persons are poisoned by the defendant's act, to admit such testimony would prejudice the case by the introduction of independent crimes, and put the defendant on his trial for two or more homicides instead of one. And even where this objection does not apply, we must remember that the dying declarations of third persons stand in a different position from the dying declarations of the deceased. The latter is to such an extent a party that his statements may often be proved by parol; the statements of deceased third persons can only be received when such statements were made under oath. To remove the latter restriction would be to substitute death-beds for the witness box, and to make the dying hours the period in which all persons knowing anything about a case should be interviewed on the subject. If such examinations are to be taken, this should be done by way of deposition before a competent officer, and not by visitors, often prejudiced, and incapable of exact and trustworthy examination.<sup>1</sup>

§ 747. *Must be a solemn sense of impending dissolution.*—The declarant, to render his declarations admissible, must have uttered them under the sense of impending dissolution,<sup>2</sup> and with

<sup>1</sup> See *Stobart v. Dryden*, 1 M. & v. State, 12 Ala. 764; *Brakefield v.* W. 615, 626; *Best's Ev.* 5th ed. 637. State, 1 Sneed, 215; *Starkey v. People*, 17 Ill. 17; *Robbins v. State*, 8

*R. v. Welburn*, 1 East's P. C. 358; Ohio St. R. (N. S.) 131; *Brown v. R. v. Van Butchell*, 3 C. & P. 629; State, 32 Miss. (3 Georg.) 433; *Kilpatrick v. Com.* 7 Casey, 198; *Com. v. Williams*, 2 Ashmead, 69; 1 Greenl. on Ev. § 158; 2 Russ. on Cr. 752; *Hill's case*, 2 Grat. 594; *Nelson v. State*, 7 Humph. 542; *Moore* 1 Legal Gaz. R. 513; *State v. Simon*,

a consciousness of the awful occasion,<sup>1</sup> though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made.<sup>2</sup> Hence where a party expressed an opinion that she would not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible.<sup>3</sup>

§ 748. *Not necessary that the deceased should have declared in words his belief, if this can be inferred from facts.* — But it is not necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury,<sup>4</sup> which may be collected from the general circumstances of his condition;<sup>5</sup> as when the party was a member of the Roman Catholic Church, and had confessed, been absolved, and received extreme unction, before making the declaration.<sup>6</sup> The same view was taken in an English case, where the evidence was that a boy between ten and eleven years of age was mortally wounded and died next day. On the evening of the day

50 Mo. 370. But see an English *nisi prius* decision by Quain, J., in 1872, admitting, in a capital case, in which the defendant was afterwards executed, the declarations of the deceased, the defendant's wife, made in her husband's absence a week before the time when the husband had threatened her life. *R. v. Edwards*, 12 Cox C. C. 230.

<sup>1</sup> *R. v. Pike*, 3 C. & P. 598; *R. v. Crockett*, 4 C. & P. 544; *R. v. Hayward*, 6 C. & P. 157; *R. v. Spilsbury*, 7 C. & P. 187; *Montgomery v. State*, 11 Ohio, 424; *State v. Poll*, 1 Hawks, 442; *Dunn v. State*, 2 Pike, 229; *R. v. Whitworth*, 1 F. & F. 382; *R. v. Forester*, 4 F. & F. 857; *S. C.* 10 Cox C. C. 368; *R. v. Mackay*, 11 Cox C. C. 148.

<sup>2</sup> *R. v. Mosley*, 1 Moody, 97; 2 Russ. on Crimes, 757. See *infra*, § 755.

<sup>3</sup> *R. v. Fagant*, 7 C. & P. 238; *S. P. State v. Center*, 85 Vermont, 378.

<sup>4</sup> *R. v. Bonner*, 6 C. & P. 386; *Dunn v. State*, 2 Pike, 229; 1 East P. C. 385; *R. v. Dingler*, 2 Leach, 561; *Anthony v. State*, 1 Meigs R. 265; *People v. Grunzig*, 1 Parker C. R. 299; *People v. Knickerbocker*, *Ibid.* 302; *Hill's case*, 2 Gratt. 594; *Nelson v. State*, 7 Humph. 441; *Brakefield v. State*, 1 Sneed (Tenn.), 215; *Morgan v. People*, 31 Ind. 193; *People v. Perry*, 8 Abbott N. Y. Pr. R. (N. S.) 27; 2 Russ. on Crimes, 761.

<sup>5</sup> *Kilpatrick v. Com.* 7 Casey, 198; *Murphy v. People*, 37 Ill. 447.

<sup>6</sup> *Com. v. Williams*, 2 Ashmead, 69; *R. v. Minton*, 1 M'Nally, 386. See *Murphy v. People*, 37 Ill. 447. The mere fact that a negro, after receiving his mortal wound, was heard to cry out, "O my people," is not alone sufficient evidence of the expectation of immediate death, to authorize the admission of his declarations. *Lewis v. State*, 9 S. & M. 115.

on which he was wounded, he was told by a surgeon that he could not recover. The boy made no reply, but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if he said what was not true; and under the circumstances his declarations were held within the rule.<sup>1</sup>

§ 749. *If deceased believed he was dying, the admissibility of his declarations is not affected by the fact that his medical attendant had hope.* — In a case before the twelve judges,<sup>2</sup> it was held that the declarations of the deceased, made on the day he was wounded and when he believed he should not recover, were evidence, although he did not die till eleven days after, and although the surgeon did not think his case hopeless, and continued to tell him so till the day of his death.

§ 750. *What expressions indicate belief in impending death.* — Where the party, being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never recover;" and where the surgeon having said, "You are in great danger," the party replied, "I fear I am;" declarations subsequently made were admitted.<sup>3</sup> On the other hand, two days before the death of the deceased, the surgeon told her that she was in a very precarious state, and that, on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but, as she was getting worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was considered not receivable in evidence, as a declaration *in articulo mortis*, as it did not sufficiently appear that, at the making of it, the deceased was without hope of recovery.<sup>4</sup> So in a case<sup>5</sup> where the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement; the statement was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration *in articulo mortis*, as it did not appear that

<sup>1</sup> R. v. Perkins, 9 C. & P. 395.

<sup>4</sup> R. v. Megson, 9 C. & P. 418.

<sup>2</sup> R. v. Mosley, 1 Moody, 97; so also R. v. Peel, 2 F. & F. 21.

<sup>5</sup> R. v. Christie, Car. C. L. 232, O. B. 1821.

<sup>3</sup> R. v. Craven, 1 Lewin C. C. 77; R. Simpson, 1 Lewin C. C. 78.

the deceased thought himself at the point of death; for, being told that the wound was not necessarily mortal, he might have still had hope of recovery. And where the only evidence of the dying man being aware of his situation consisted in his saying "he should never recover," it was held insufficient.<sup>1</sup>

§ 751. So also as to the following writing made by the deceased before his death: "Darling: The Doctor — I mean Dr. Medicott — gave me a quinine powder Wednesday night, April 26. The effects are these: I have a terrible sensation of a rush of blood to the head, and my skin burns and itches. I am becoming numb and blind. I can hardly hold my pencil, and I cannot keep my mind steady. Perspiration stands out all over my body and I feel terribly. The clock has just struck eleven, and I took the medicine about 10.30 P. M. I write this so that if I never see you again you may have my body examined and see what the matter is. Good-by, and ever remember my last thoughts were of you. I cannot see to write more. God bless you, and may we meet in heaven.

"Your loving Hubbie.

I. M. RUTH."

This was ruled out, as insufficient on its face; there being no other evidence as to the condition of the defendant's mind.<sup>2</sup>

§ 752. So a dying declaration cannot be admitted by the judge merely from his own notion of the nature of the wound as described (without any evidence that the deceased, at that time, believed himself about to die), unless, at all events, it is shown to have been such as must necessarily have caused death in a short time, and such as all men reasonably would suppose to be so, and unless it may be inferred that the deceased shared this view.<sup>3</sup>

§ 753. A statement concluded with these words: "I have made this statement believing I shall not recover;" at the time it was made the deceased was in such a state that his death must speedily follow; and he died seven days afterwards. But it appeared, also, that shortly before he made the declaration he had said to a constable, who asked him how he was, "I have seen Mr. Booker, the surgeon, to-day, and he has given me some little hope that I am better; but I do not myself think I shall ultimately recover." Afterwards, on the same occasion, he said

<sup>1</sup> R. v. Van Butchell, 3 C. & P. 631.

<sup>2</sup> State v. Medicott, 8 Kans. 257.

See also People v. Robinson, 2 Parker C. R. 235.

<sup>3</sup> R. v. Cleary, 2 F. & F. 850.

he could not recover. It was held that there was sufficient evidence that the statement was made under a consciousness of impending death to justify its reception in evidence.<sup>1</sup>

"I am dead; Mr. F. has killed me," uttered a few hours before dissolution, renders a declaration admissible.<sup>2</sup>

§ 754. *Even a faint hope excludes.* — In New York it has been laid down in a circuit court that dying declarations should not be excluded in all cases where there is a faint and lingering hope of recovery.<sup>3</sup> But such a relaxation of the rule is perilous; and though we have no right to rule out such evidence because we conjecture that the deceased may have at certain moments nourished a transient hope, yet, so far as the construction of the deceased's own utterances are concerned, it is best to take the rule without qualification, and to hold that the expression of a hope excludes.<sup>4</sup> Thus in an English case, a magistrate's clerk administered an oath to a dying person, and she made a statement. He asked her if she felt she was likely to die? She said, "I think so." He said, "Why?" She replied, "From the shortness of my breath." He said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None." He then proceeded to write out the deposition, and when finished read it to her, and asked her to correct any mistake that he might have made. She said, "No hope, at present, of my recovery," and he then inserted those words. It was held, that the declaration was inadmissible, as the words "at present," introduced by the deceased, were a qualification of her previous statement that she had no hope of recovery.<sup>5</sup>

§ 755. *Declarations need not have been made immediately before death.* — As has been seen, the fact of the declarations not being made immediately previous to death does not exclude them, provided the deceased was conscious at the time he was in a dying situation.<sup>6</sup>

<sup>1</sup> *R. v. Reany*, 40 Eng. Law & Eq. 552; *Dears. & B.* 151; 7 Cox C. C. 209.

<sup>2</sup> *State v. Freeman*, 1 Spears, 57.

<sup>3</sup> *People v. Anderson*, 5 Wheel. C. C. 398.

<sup>4</sup> *Jackson v. Com.* 19 Grattan, 656; *State v. Moody*, 2 Haywood, 31.

<sup>5</sup> *R. v. Jenkins*, 11 Cox C. C. 250.

<sup>6</sup> *R. v. Mosley*, 1 Moody, 97; *R. v. Megson*, 9 C. & P. 418; *R. v. Reany*, *ut supra*; *State v. Poll*, 1 Hawks, 442; *Com. v. Cooper*, 5 Allen, 495; *State v. Oliver*, 4 Houst. 585; 1 Greenleaf on Evidence, § 158; *McDaniel v. State*, 8 S. & M. 490.

§ 756. *Prior declarations admissible if reaffirmed under consciousness of dissolution.* — Such declarations are to be viewed as admissible, although the declarant did not, at the time of making them, believe he was about to die, if he subsequently referred to them and affirmed their truth at a time when he knew he was dying.<sup>1</sup>

§ 757. *Only admissible when death is the subject of the charge.* — The declarations are only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration.<sup>2</sup> Thus, in a case where the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with attempt to procure abortion; evidence of the dying declarations of the woman was rejected, the judge observing that, although the declarations might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.<sup>3</sup> We may conclude, therefore, that such declarations are limited to criminal prosecutions when the subject matter of the investigation is the declarant's death;<sup>4</sup> and there is sound reason in this, for if the declarations of third parties are introduced under this sanction, it would be difficult to exclude them from any collateral trial in which they should be offered.

§ 758. *Admissible from husband against wife, and vice versa.* — On the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to

<sup>1</sup> *R. v. Steel*, 12 Cox C. C. 168; 286; *R. v. Hind*, 8 Cox C. C. 300; *Young v. Com.* 6 Bush (Ky.), 312. *R. v. Newton*, 1 F. & F. 641. See

<sup>2</sup> Wh. C. L. 7th ed. § 670, 671; 2 Wooten v. Wilkins, 39 Ga. 223; *R. v. Russ. on Crimes*, 761; *State v. Shelton*, 2 Jones (Law), N. C. 360; *Hudson v. State*, 3 Cold. (Tenn.) 355; *Hackett v. People*, 54 Barbour, 370. This principle is recognized in *Stobart v. Dryden*, 1 M. & W. 615, 626. As also establishing this point may be consulted *R. v. Jenkins*, L. R. 1 C. C. 192 — *Kelly*, C. B.; *Anderson*, in re, 20 Up. Can. Q. B. — *McLean*, J.; and *R. v. Peltier*, 4 Low. Can. R. 3.

<sup>3</sup> *R. v. Hutchinson*, 2 B. & C. 608 n. See also *Wilson v. Boorem*, 15 Johns. An. 558; and *supra*, § 746.

<sup>4</sup> *State v. Fitzhugh*, 2 Oregon, 227; *Hudson v. State*, 3 Cold. (Tenn.) 355; *Hackett v. People*, 54 Barbour, 370. See *contra*, *State v. Wilson*, 23 La.



the cause of her death, are competent evidence against the prisoner,<sup>1</sup> and so are the dying declarations of a husband against his wife.<sup>2</sup>

§ 759. *The deceased must have been competent as a witness. Infants.*—The dying party, to make the declarations evidence, must have been competent as a witness; therefore, the declarations of a dying child, of only four years of age, have been held inadmissible.<sup>3</sup> But if the child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences in a future state of telling a falsehood, his declarations, made under a sense of impending dissolution, are admissible.<sup>4</sup> Thus, the dying declarations of an intelligent child ten years old have been admitted.<sup>5</sup>

§ 760. *Infidels.*—That the deceased was a disbeliever in a future state of rewards and punishments may, in the lowest view, be used to discredit his testimony,<sup>6</sup> though it does not exclude in jurisdictions where the deceased, if a witness, would have been admissible.<sup>7</sup>

§ 761. *Infamous persons.*—The dying declarations of persons disqualified by conviction of an infamous offence, are at common law inadmissible.<sup>8</sup>

§ 762. *Mental incapacity.*—T. being at the point of death, and conscious of her condition, but unable to speak articulately in consequence of wounds inflicted upon her head, was asked whether it was C. who inflicted the wounds; and if so, she was requested to squeeze the hand of the person making the inquiry. It was held, that under all the circumstances of the case there was proper evidence against C. for the consideration of the jury; they being the judges of its credibility, and of the effect to be given to it.<sup>9</sup>

§ 763. A statement written by an attorney during the night on which the deceased died was held not admissible as the dying

<sup>1</sup> *People v. Green*, 1 Denio, 614; *Pa. v. Stoops*, Addison, 381.

<sup>2</sup> *Moore v. State*, 12 Alabama R. 764.

<sup>3</sup> *R. v. Pike*, 3 C. & P. 598; 2 Russ. on Crimes, 765.

<sup>4</sup> 2 Russ. on Crimes, 765.

<sup>5</sup> *R. v. Perkins*, 2 M. C. C. 135; *S. C.* 9 C. & P. 395.

<sup>6</sup> *Goodall v. State*, 1 Oregon, 333.

<sup>7</sup> *People v. Sanford*, 43 Cal. 29; but see *supra*, § 742, as to degree of credibility to be given to such evidence.

<sup>8</sup> *Drummond's case*, 1 Leach, 337; 1 Russ. C. & M. 763.

<sup>9</sup> *Com. v. Casey*, 11 Cush. (Mass.) 417.

declarations of the deceased, when it appeared that the attorney propounded questions to him, which he tried to answer, but was unable to do so; that his attendant friends then "explained the questions to him, and made the answers, to which he assented only by nodding his head;" that the statement, consisting of the answers thus made, was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head;" that he spoke but a few words afterwards, and had frequently to be aroused; and that he seemed while the statement was being read to him, to be in a stupor.<sup>1</sup>

§ 764. To throw light on the deceased's mental state his declarations on collateral matters are admissible.<sup>2</sup>

§ 765. *Evidence must have been admissible had the deceased been sworn. Matters of opinion are inadmissible.* — Nothing can be evidence, in a declaration *in articulo mortis*, that would not be so if the party were sworn. On this rule, anything the murdered person, *in articulo mortis*, says as to the facts is receivable, but not what he says as matter of opinion or belief.<sup>3</sup> Hence the declaration, "It was E. W. who shot me, though I did not see him," is inadmissible.<sup>4</sup> But where in making a dying declaration the declarant, in speaking of the fatal wound, said it was done without any provocation on his part, it was held in Ohio that this declaration was not incompetent, it relating to fact, not opinion.<sup>5</sup>

§ 766. *Practice when declarations have been reduced to writing.* — If the declaration of the deceased, at the time of his making it, be reduced into writing, the written document must be given in evidence, and no parol testimony respecting its contents can be

<sup>1</sup> *McHugh v. State*, 31 Alab. 317. See also *Barnett v. People*, 54 Ill. 325.

<sup>2</sup> *Donnelly v. State*, 2 Dutcher, 496.

<sup>3</sup> *R. v. Sellers*, O. B. 1796, Car. C. L. 233; *McPherson v. State*, 22 Geor. 478; *Johnson v. State*, 17 Ala. 618; *Ben v. State*, 37 Ala. 103; *Whitley v. State*, 38 Ga. 50; *Binns v. State*, 46 Ind. 311.

<sup>4</sup> *State v. Williams*, 68 N. Car. 62.

<sup>5</sup> *Wroe v. State*, 20 Ohio State R. 460. See 1 Greenl. on Ev. § 99.

When upon the trial of a prisoner for the murder of his wife, a wit-

ness for the People, who had heard cries proceeding from the house of the prisoner in the night preceding her death, was permitted, in the court below, to testify what these cries indicated, whether the person was crying from joy or grief; this was reversed in the supreme court of New York, on the ground that the question called for the conjecture of the witness as to the cause of the cries, and not for a description of them. *Peckham and Allen, JJ., contra. Messner v. People*, 6 Hand (45 N. Y.), 1.

admitted.<sup>1</sup> And it has been held in England that if a declaration *in articulo mortis* be taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of a declaration which is not itself produced when its production is possible.<sup>2</sup> But where the dying person repeated his declaration three several times in the course of the same day, the fact of its having been committed to writing in the presence of a magistrate, on the second occasion, will not, it seems, exclude parol evidence of the others, where it is not in the power of the prosecutor, at the trial, to give that which has been committed to writing in evidence.<sup>3</sup> And on one occasion in Ireland, in a case where the depositions of the individual, made at the time when he thought himself dying, were taken down by the magistrate, and not in the presence of the prisoner, it being objected at the trial that the depositions were not pursuant to the statute,<sup>4</sup> the magistrate was sworn, and gave parol evidence of the declarations of the deceased.<sup>5</sup> In this country, in cases where no statute exists to authorize the taking of such a deposition, it has been said that a written statement so taken is inadmissible, though it may be received as secondary evidence, or to refresh the memory of the magistrate.<sup>6</sup> On the other hand, a deposition was received upon evidence that upon being read to the deceased, he said it was "as nigh right as he could recollect the circumstances."<sup>7</sup> Of course, when the deposition is put in evidence, the *whole* is to be read.<sup>8</sup> When lost, parol evidence of its contents can be given.<sup>9</sup>

§ 767. *Admissible without these limitations when part of the res gestæ.* — Where the declarations of the injured party are part of the *res gestæ*, they are admissible without proof of a consciousness of approaching death;<sup>10</sup> but such is not the case, when they relate to anything beyond the *corpus delicti*. Thus, in death by

<sup>1</sup> Vin. Ab. Evid. 38 A. b; though see *Beets v. State*, 1 Meigs, 106.

<sup>2</sup> *R. v. Gay*, 7 C. & P. 280; S. P. *Binns v. State*, 46 Ind. 311.

<sup>3</sup> *R. v. Reason*, 1 Str. 500.

<sup>4</sup> 10 Car. c. 1, Irish.

<sup>5</sup> *R. v. Callaghan*, 1 M'Nally, 385; *R. v. Woodcock*, 2 Leach, 563.

<sup>6</sup> *Beets v. State*, 1 Meigs, 106.

<sup>7</sup> *State v. Ferguson*, 2 Hill S. C. 619.

<sup>8</sup> *State v. Martin*, 30 Wisconsin, 216.

<sup>9</sup> *State v. Patterson*, 45 Vt. 308.

<sup>10</sup> *Com. v. M'Pike*, 3 Cush. 181; *Com. v. Hackett*, 2 Allen, 136; *State v. Porter*, 34 Iowa, 131; *State v. Wagner*, 61 Me. 178; and see *R. v. Edwards*, 12 Cox C. C. 230.

wounding, they have been confined to statements necessary to give information on the subject of the wound,<sup>1</sup> and in death by poisoning, to details of the deceased's health.<sup>2</sup>

§ 768. *Admissibility is for the court.* — The court are to decide as to the admissibility of the declarations.<sup>3</sup> Consequently, the truth of the facts put in evidence, to show that declarations were made in view of speedy death, is matter for the court; and its decision on the facts it finds proven is matter of law, and may be reviewed.<sup>4</sup> Where the state offers evidence of the dying declarations of the deceased, and the defendant objects to their admissibility and moves to exclude them, if the court refuses to decide on the motion until all the evidence in the case is closed, and compels the defendant to proceed with his defence, and then, after the evidence in the case is closed, decides the defendant's motion and excludes a part only of the dying declarations objected to, and the defendant is convicted, the judgment will be reversed.<sup>5</sup>

§ 769. *Are to be examined and impeached by same tests as are applicable to evidence adduced on trial.* — The same principles of law are applicable to the contradictory statements of persons *in extremis*, as to those of a witness under examination on oath.<sup>6</sup> Where the court below charged the jury, "if they found that the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness," it was held that this charge was erroneous.<sup>7</sup>

<sup>1</sup> *Denton v. State*, 1 Swan (Tenn.), 279. See *Donelly v. State*, 2 Dutch. (N. J.) 463, 601, 670.

<sup>2</sup> *R. v. Johnson*, 2 C. & K. 354.

<sup>3</sup> 1 Leach, 504; *R. v. Hucks*, 1 Stark. 522; *R. v. Van Butchell*, 3 C. & P. 629; *R. v. Reany*, 40 Eng. Law & Eq. 552; *Dears. & B.* 151; 7 Cox C. C. 209; *R. v. Jenkins*, L. R. 1 C. C. 187; 1 Greenl. on Evid. § 160; *M'Daniel v. State*, 8 S. & M. 401; *Hill's case*, 2 Gratt. 594; *People v. Glenn*, 10 Cal. 32; *Starkey v. People*, 17 Ill. 17; *Donelly v. State*, 2 Dutch. (N. J.) 601; *State v. Poll*, 1 Hawks, 442; *Lambeth v. State*, 23 Miss. 322;

*Com. v. Murray*, 2 Ashmead, 41; *State v. Williams*, 68 N. C. 62; *Dixon v. State*, 13 Fl. 636; *contra*, *Campbell v. State*, 11 Georgia, 354.

<sup>4</sup> *Donelly v. State*, 2 Dutch. (N. J.) 463, 601.

<sup>5</sup> *Johnson v. State*, 47 Ala. 9.

<sup>6</sup> *R. v. Sellers*, *supra*, § 765; *McPherson v. State*, 9 Yerger, 279; *People v. Lawrence*, 21 Cal. 368; *People v. Knapp*, 1 Edm. (N. Y.) Sel. Cas. 177; *Com. v. Lenox*, 3 Brewster, 249; *Hurd v. People*, 25 Mich. 405; *People v. Knapp*, 26 Mich. 112.

<sup>7</sup> *McPherson v. State*, *ut supra*.

In Ohio, however, it has been ruled, though with doubtful propriety, that where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration, nor a part of the *res gestæ*, is not admissible to impeach such declarations.<sup>1</sup>

§ 770. *Inadmissible if clearly fragmentary.* — If it be shown that the declarations were uttered by the dying man, to be connected with and qualified by other statements and with them to form an entire complete narrative, and before the purposed disclosure was fully made, they had been interrupted and the narrative left unfinished; such partial declarations, it is said, would not be competent evidence.<sup>2</sup> But if it appear that the deceased stated all that he desired to say, the fact that the narrative of what occurred is not complete does not render the declaration incompetent.<sup>3</sup>

§ 771. *No objection that questions were leading, if deceased spoke intelligently.* — The objection that the questions to which the answers of the dying man were given were leading questions is not properly applicable, if it appear that the deceased spoke intelligently and did not merely torpidly assent to what was said by his questioner.<sup>4</sup>

§ 772. *Substance may be proved.* — The substance of dying declarations may be admitted in evidence, and this may be done, if need be, through the medium of interpreters.<sup>5</sup>

§ 773. *Character of deceased for truth may be impeached.* — It seems that evidence is admissible, on part of the defence, to impeach the character of the deceased for truth; he standing on the same footing as a witness called into court and then examined;<sup>6</sup> and in one case, where the dying declarations of the deceased were admitted to show that the defendant, with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to

<sup>1</sup> *Wroe v. State*, 20 Ohio State R. 238; *R. v. Smith*, Leigh & Cave C. C. 460. 607.

<sup>2</sup> *Vass v. Com.* 3 Leigh, 786.

<sup>5</sup> *Starkey v. People*, 17 Ill. 17;

<sup>3</sup> *State v. Nettlebush*, 20 Iowa, 257; *Montgomery v. State*, 11 Ohio, 424; *Vass v. Com.* 3 Leigh, 786; *State v. Ward v. State*, 8 Blackford, 101; *Patterson*, 45 Vt. 308. *Nelms v. State*, 13 Sm. & M. 500.

<sup>4</sup> *Ibid.*; *Com. v. Casey*, 11 Cush. See § 766.

(Mass.) 417; *People v. Sanchez*, 24 <sup>6</sup> *Nesbit v. State*, 43 Ga. 238; *Don- Cal. 17*; *R. v. Fagent*, 7 C. & P. elly v. State, 2 Dutcher, 496.

show that the declarant was considered a woman of loose character and light reputation.<sup>1</sup> So it may be shown that the declarant was insane,<sup>2</sup> or was an unbeliever,<sup>3</sup> or was in the constant habit of making mistakes as to the identity of others.<sup>4</sup> It has been held, however, that it is not competent for the prisoner to prove that, before the affray, the deceased had expressed a violent hatred to him, and a disposition to do him injury, or that he was very hostile to him.<sup>5</sup>

§ 774. *Jury are to judge of credibility of such declarations.*—Where dying declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which or whether either is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions, it is error.<sup>6</sup> The jury are to judge of the credit due to dying declarations, as in the case of any other testimony, by all the circumstances.<sup>7</sup>

§ 775. *Admissible when in defendant's favor.*—The dying declarations of the deceased may be received in favor of the defendant. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state which he was in, and said he knew he could not get better, and afterwards said, "I don't think he would have struck me if I had not provoked him." Coleridge, J., at first expressed some doubt whether he ought to receive the statement, but afterwards received the evidence, observing that it might have an influence on the amount of punishment.<sup>8</sup> But such declarations must be made under a sense of impending dissolution.<sup>9</sup>

<sup>1</sup> *People v. Knapp*, per Edmonds, Starkey v. *People*, 17 Ill. 17. See J., 1 Edm. Sel. Cas. 177. See Carter v. *People*, 2 Hill's N. Y. R. 317.

<sup>2</sup> *Donnelly v. State*, 2 Dutcher, 469.

<sup>3</sup> See supra, § 760.

<sup>4</sup> *Com. v. Cooper*, 5 Allen (Mass.), 495.

<sup>5</sup> *State v. Varney*, 8 Boston L. R. 542.

<sup>6</sup> *Moore v. State*, 12 Ala. 764;

*Starkey v. People*, 17 Ill. 17. See supra, § 742.

<sup>7</sup> *Donnelly v. State*, 2 Dutch. (N. J.) 483, 601; *Com. v. Casey*, 11 Cush. 417. See supra, § 742.

<sup>8</sup> *R. v. Scaife*, 1 Moody & Robinson, 551; 2 Lewin C. C. 150; U. S. v. Taylor, 4 Cranch C. C. R. 338. See *Moore v. State*, 12 Ala. 764.

<sup>9</sup> *Com. v. Densmore*, 12 Allen, 535.

## CHAPTER XXII.

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Exactness no longer necessary in description, § 837.

When two mortal wounds are averred either may be proved, § 843.

XVII. "OF WHICH SAID MORTAL WOUND THE SAID E. F., FROM, ETC., TO, ETC., AT, ETC., DID LANGUISH, AND LANGUISHINGLY DID LIVE," § 844.

XVIII. "OF WHICH SAID, ETC., AT, ETC. OF THE WOUND AFORESAID, DIED," § 845.

Death must be averred to have been within year and day of wound, § 845.

Place must be averred, § 846.

Connection between wound and death must be averred, § 847.

Mode of averring time, § 848.

XIX. "AND SO THE JURORS AFORESAID, ETC., DO SAY, THAT THE SAID A. B., HIM THE SAID E. F., IN MANNER AND FORM AFORESAID, FELONIOUSLY, WILFULLY, AND OF HIS MALICE AFORETHOUGHT DID KILL AND MURDER," § 849.

Malice aforethought necessary, § 850.

Defendant's name to be repeated, § 851.

Averment as to principal and accessory, § 852.

XX. "CONTRARY TO THE FORM," ETC., § 855.

XXI. DISTINCTIVE FEATURES OF MANSLAUGHTER, § 856.

XXII. JOINDER OF COUNTS, § 857.

#### I. NAME AND PLACE OF RESIDENCE.

§ 780. *Name and surname.* — The Christian and surname of the defendant, if known, should be stated with correctness; the object being to describe him with such exactitude as to determine his identity.<sup>1</sup>

But if the name of a defendant is unknown, and he refuses to disclose it, an indictment may be sustained against him as "a person whose name is to the jurors unknown, but who is personally brought before the said jurors by —, the keeper of the prison of —." <sup>2</sup> The cases tend to show that if a defendant has more than one Christian name given him in baptism, as John Thomas, they are considered in law as forming one Christian name, and must be set out correctly in their order; <sup>3</sup> though in this country it is generally held that a middle name is surplusage,

<sup>1</sup> 2 Hawk. c. 25, s. 68; Archbold's C. P. 25; Wharton's C. L. 7th ed. § 235.

<sup>2</sup> R. v. —, R. & R. 489. See Whart. C. L. 7th ed. § 242.

<sup>3</sup> Com. v. Perkins, 1 Pick. 388;

Jones v. Macquillon, 5 T. R. 195; 3 East, 111; Willes, 554; Evans v. King, 1 Phill. R. 499; Stanhope v. Baldwin, 1 Addams R. 93. See 1 M. & Gr. 783, n.



and its omission to be disregarded.<sup>1</sup> If set out, however, it must be proved as laid.<sup>2</sup>

The proper name of a bastard is that which he has gained by reputation, and not his mother's name, unless so gained.<sup>3</sup>

§ 781. *Place of residence of defendant.* — With respect to residence, it is a good addition of this kind to name the party *late* of a township named ;<sup>4</sup> in which respect this addition differs from that of the *estate, degree, or mystery* ; and it is said, that if the defendant be named commorant in A., late of B., it is sufficient.<sup>5</sup>

With respect to addition of place, the best and most convenient course is to state that in which the prisoner committed the offence ; for he is considered as resident in that place, and by this means the confusion of stating two places in the indictment is avoided.<sup>6</sup>

## II. ADDITION AND MYSTERY.

§ 782. *Proper addition of the accused party.* — The statute 1 Henry 5, c. 5, enacts, that in all indictments on which process of outlawry lies, additions shall be made to the *defendants'* names, of their estates or degree, or mystery, and of the towns or hamlets, or places, and the counties of which they were or are commorant.

§ 783. This statute has been either recognized as in force in those states where the question has been brought up independent of local legislation, or has been substantially reenacted.<sup>7</sup>

§ 784. There are few cases in the American books where the niceties of the English law of additions have been recognized ; and in most of our states the necessity of an addition is superseded by statute.<sup>8</sup> A want of an addition *in toto* is, at common

<sup>1</sup> *Roosevelt v. Gardiner*, 2 Cow. 463 ; *People v. Cook*, 14 Barb. 259 ; *State v. Manning*, 14 Tex. 402 ; *State v. Williams*, 29 Iowa, 78.

<sup>2</sup> *Price v. State*, 19 Ohio, 423 ; *State v. Hughes*, 1 Swan (Tenn.), 266 ; *State v. Martin*, 10 Mo. 391 ; *contra*, *People v. Lockwood*, 6 Cal. 205 ; *Miller v. People*, 39 Ill. 457.

<sup>3</sup> *R. v. Clark*, R. & R. 358.

<sup>4</sup> See *Dickinson's Q. S.* 203 ; *R. v. Yandell*, 4 T. R. 521.

<sup>5</sup> *Cortizos v. Munoz*, Stra. 924 ; Wh. C. L. 7th ed. § 248.

<sup>6</sup> 2 Hawk. c. 27, s. 125, 126.

<sup>7</sup> Whart. C. L. 7th ed. § 243 ; *State v. Hughes*, 3 Har. & M'H. 479 ; *Com. v. Sims*, 2 Va. Cases, 374 ; *Com. v. Lewis*, 1 Met. 151 ; *State v. Bishop*, 15 Maine, 122.

<sup>8</sup> See Whart. C. L. 7th ed. § 217, 248.

law, ground for a motion to quash ; but the additions "yeoman," "spinster," "gentleman," "laborer," may be relied upon universally in their proper relations as sufficient. In Virginia, it is true, in an old case, the difference between "laborer" and "yeoman" was held material ;<sup>1</sup> but the present tendency is to regard the existence of any additions, however general, as enough. Perhaps "yeoman" is the most general and unexceptionable.<sup>2</sup>

§ 785. *Mystery at time of finding.* — At common law, the additions of estate, degree, and mystery of the defendant are not sufficient, unless they be the same which he had at the time of the finding of the indictment ; and in this respect such additions differ from that of place, which is sufficiently shown by naming the defendant *late* of such a place ; and such additions must be expressed in such manner that it may plainly appear to refer to the party ; and therefore the addition is not well expressed by naming him son of A., of B., butcher, because butcher refers rather to the father than to the son.<sup>3</sup>

§ 786. *How error in name or addition operates.* — The only mode by which at any time advantage can be taken by a prisoner of any error in his name or addition is by plea in abatement ;<sup>4</sup> though as we have seen, where *no* addition is given, or where there is no Christian name, the proper course is to move to quash. If the defendant once pleads the general issue *not guilty*, he cannot afterwards take advantage of any such error, for he is precluded and estopped by his plea ; and he is not obliged to take advantage of an error in these respects, by pleading in abatement, in order to make his acquittal a valid bar to any subsequent prosecution for the same offence ; for if he be afterwards indicted for the same offence by another name or addition, he may show himself to be the same person by averment and evidence, and rely with success on his previous acquittal notwithstanding the variance.<sup>5</sup>

<sup>1</sup> Com. v. Sims, 2 Va. Cases, 374.

<sup>2</sup> Har. & M'H. 479. See State v.

<sup>3</sup> State v. Cherry, 3 Murph. 7. See cases cited in Whart. C. L. 7th ed. § 245.

Newman, 2 Car. Law Rep. 74; Com. v. Dedham, 16 Mass. 146; Turns v. Com. 6 Met. 225; Com. v. Sayers, 8 Leigh, 722; R. v. Granger, 3 Burr. 1617.

<sup>4</sup> 2 Inst. 670; 2 Hale, 177.

<sup>5</sup> Whart. C. L. 7th ed. § 245; State v. Lorey, 2 Brevard, 395; Lynes v. State, 5 Port. 236; State v. Hughes,

<sup>6</sup> 2 Hawk. c. 23, s. 103, 104; Wh. C. L. 7th ed. § 556, 568.

## III. TIME AND PLACE.

§ 787. *When time is to be averred and proved.* — Though some precise day, month, and year must be charged, directly or indirectly,<sup>1</sup> yet it is not necessary to sustain the precise allegation in proof, if the time stated be previous to the finding the indictment;<sup>2</sup> but it is material to show that the prosecution was commenced in due time, where it is enacted that it shall be commenced within a particular time;<sup>3</sup> and where the offence is statutory, the time laid must be subsequent to the passage of the statute by which the offence was created. It is not, however, necessary to allege *time* to any charge of mere negation or omission.<sup>4</sup>

§ 788. *Repugnant dates.* — If the offence is laid on an uncertain or impossible day, or on a future day, or on different days, or on such a day as renders the indictment repugnant to itself, the objection is fatal in arrest of judgment even after verdict.<sup>5</sup> Thus judgments were arrested when the date charged was November, 1801, and the 25th year of American Independence, the dates being inconsistent;<sup>6</sup> where, on a charge of compounding felony, the date of the commission of the offence was laid anterior to the date fixed for the commission of the larceny;<sup>7</sup> and where the crime was alleged to have been committed on September 30, 1038.<sup>8</sup> So if the date be left blank.<sup>9</sup>

An indictment for murder which stated that A. B., late of Bladen County, &c., with force and arms, in the county aforesaid, &c., was held to contain a sufficient description of the place where the murder was alleged to have been committed.<sup>10</sup>

§ 789. In Massachusetts an indictment for manslaughter has been sustained which averred that T., on the 26th day of Septem-

<sup>1</sup> Whart. C. L. 7th ed. § 261; State v. Beckwith, 1 Stew. 318; R. v. Taylor, 3 B. & C. 502.

<sup>2</sup> Starkie C. P. 58; Whart. C. L. 7th ed. § 264; Shelton v. State, 1 Stew. & Port. 208.

<sup>3</sup> See Salk. 369, 378; Carth. 501; 5 Mod. 446; 1 Ld. Raym. 582; 10 Mod. 248.

<sup>4</sup> R. v. Holland, 5 T. R. 616; Starkie's C. P. 61.

<sup>5</sup> Whart. C. L. 7th ed. § 264, 273.

<sup>6</sup> State v. Hendricks, Conf. N. C. R. 369.

<sup>7</sup> State v. Dandy, 1 Brevard, 395.

<sup>8</sup> Serpentine v. State, 1 How. Miss. R. 260.

<sup>9</sup> State v. Beckwith, 1 Stewart, 318; State v. Roach, 2 Hay. 552; Tam v. State, 3 Miss. 43. See fully Whart. C. L. 7th ed. § 261, 273.

<sup>10</sup> State v. Lamon, 3 Hawks, 175.

ber, at Groton, in the county of Middlesex, "in and upon one L., then and there being, feloniously and wilfully did make an assault, and with a stone, which said T. then and there had and held, in and upon the head of said L., then and there feloniously and wilfully did cast and throw, and with the said stone, so as aforesaid cast and thrown, the aforesaid L. then and there feloniously and wilfully did strike, penetrate, and wound, giving to the said L., by casting and throwing of the stone aforesaid, in and upon the head of said L., a mortal wound," &c. This was held sufficiently to aver that T. gave L. a mortal wound, on the 25th of September, at Groton.<sup>1</sup>

An indictment for murder, charging that the accused, on or about a certain day, did wilfully, feloniously, and with malice aforethought kill, murder, and put to death a certain person with a pistol and knife, without specifying further the facts and manner, is bad.<sup>2</sup>

§ 790. In this country, as has been already noticed, the usual practice in averring place is by charging the offence to have taken place in the county where it was committed.<sup>3</sup> In Massachusetts, however, it has been held, that if from the terms of the location of a town or district by the act of incorporation, the court cannot conclude that the whole town, district, or unincorporated place lies in the same county, both town and county must be averred;<sup>4</sup> and in the same case it was declared, that the proper course in that state, in all capital cases, is to lay both county and town. In the city of New York the practice is to name the *ward*; in the city of New Orleans, the parish.<sup>5</sup>

§ 791. *Repeating time and place to every material fact.*—When time and place have been once named with precision, the words "*then and there*," referring to the last antecedent, will afterwards sufficiently express both.<sup>6</sup> Where the circumstances stated in indictments for misdemeanors are merely continuous, as in assaults with aggravation, one mention of time and place, as applicable to *all* circumstances, will suffice; but this is otherwise in felonies, where distinct and independent circumstances are

<sup>1</sup> *Turns v. Com.* 6 Met. 225.

<sup>4</sup> *Com. v. Springfield*, 7 Mass. 9.

<sup>2</sup> *People v. Aro*, 6 Cal. 207.

<sup>5</sup> See fully Whart. Cr. L. 7th ed.

<sup>3</sup> Wh. C. L. 7th ed. § 277; Duncan § 277.

*v. Com.* 4 S. & R. 448; *State v. Lamon*, 3 Hawks, 195.

<sup>6</sup> Wh. C. L. 7th ed. 277 *et seq.*; *Stout v. Com.* 11 S. & R. 177.

necessary to the charge.<sup>1</sup> But the mere qualification "and," without the word "then," is sufficient to extend the original allegation of time to the averment thus introduced.<sup>2</sup> Where the time and place are immaterial, they may be introduced by the words, *to wit*; though without a *scilicet* in such case, a variance would not prejudice; and as in cases where they are of the essence of the charge a *scilicet* will not aid a variance in proof,<sup>3</sup> it is rarely ever useful.<sup>4</sup>

§ 792. *Averment of place of death.* — Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county;<sup>5</sup> but by the 2 & 3 Edw. 6, c. 24, s. 2, it was enacted that the trial should be in the county where the death happened. The place of death should be either expressed or implied.<sup>6</sup>

§ 793. If a person be stricken and die in the county of A., and the body be found in B., it is to be removed into A. for the coroner of that county to take the inquest.<sup>7</sup>

It has been ruled that if a person be stabbed in Virginia, and die of his wounds in another state, the accused cannot be tried at common law for murder in Virginia; but he may be tried for the stabbing in the county where the blow was inflicted.<sup>8</sup> This is now rectified by statute. Judge Washington, following the common law doctrine in this respect, once ruled that where the party injured expired on land, the United States had no jurisdiction, though the blow was struck on the ocean.<sup>9</sup>

<sup>1</sup> 2 Hale, 178; R. v. Cotton, Cr. El. 738.

<sup>2</sup> Wh. C. L. 74.

<sup>3</sup> Busby v. Watson, Bla. Rep. 1050.

<sup>4</sup> Dickinson's Q. S. 6th ed. 212.

<sup>5</sup> 2 Hawk. P. C. c. 25, s. 36. The county of the death has no jurisdiction. State v. Carter, 3 Dutch. 498.

<sup>6</sup> Hawk. b. 2, c. 25, s. 26; Riggs v. State, 26 Mississ. 51; State v. Haney, 67 N. C. 467; 1 Ch. C. L. 178; 8 Ibid. 782; State v. Orrell, 1

Dev. 189; Com. v. Linton, 2 Va. Cas. 205; Riley v. State, 9 Humph. 646; Stoughton v. State, 13 Sm. & M. 255; State v. Toomer, 1 Chev. 106; Nash v. State, 2 Greene (Iowa), 286; People v. Aro, 6 Cal. 207; 1 Stark. C. P. 5, 6.

<sup>7</sup> 2 Hale, 66; 1 Ms. Sum. 53; 1 East P. C. c. 5, s. 127, p. 361.

<sup>8</sup> Com. v. Linton, 2 Va. Cas. 205.

<sup>9</sup> U. S. v. McGill, 1 Wash. C. C. 468; 4 Dall. 427.

The federal courts have now such jurisdiction by statute.<sup>1</sup> In Michigan and Massachusetts, statutes giving jurisdiction to the courts of the county where the death occurs have been declared constitutional.<sup>2</sup>

In Pennsylvania, a similar provision is adopted by statute.<sup>3</sup>

In Mississippi, by statute, the indictment must be found in the county where the death occurred, and must so state.<sup>4</sup>

#### IV. FORCE AND ARMS.

§ 794. *Vi et armis*. — Whatever may once have been thought of the magic of these words, it is now settled that they are unnecessary.<sup>5</sup>

#### V. "MOVED AND SEDUCED BY THE INSTIGATION OF THE DEVIL."

§ 795. These words, though usual, are superfluous, and may be omitted with safety.

#### VI. "IN AND UPON ONE E. F."

§ 796. *Name and addition of the deceased*. *What certainty is required*. — The indictment must be so certain as to the party against whom the offence was committed, as to enable the prisoner to know and understand who that party is, and what charge he is called on to answer.<sup>6</sup> And an error in setting forth the names of such party is much more serious than in setting forth the name of the defendant himself, as the latter can only be taken advantage of by abatement, but the former is proper ground for acquittal in case of variance in evidence, or arrest of judgment in case of variance on record.<sup>7</sup> The misspelling of a surname, however, when its usual pronunciation is satisfied by the manner in which it is written in the record, is no variance.<sup>8</sup>

§ 797. *When deceased is unknown*. — Where the name and addition of the deceased cannot be ascertained, as where a body of a murdered person is found who cannot be identified, the indictment may allege the party to be "to the jurors unknown."<sup>9</sup>

<sup>1</sup> Wh. C. L. 7th ed. § 210 g.

<sup>2</sup> Wh. C. L. 7th ed. 210 g.

<sup>3</sup> Rev. Stat. § 46.

<sup>4</sup> Turner v. State, 28 Missis. 684.

See Riggs v. State, 26 Missis. 51.

<sup>5</sup> See fully Wh. C. L. 7th ed. § 403.

<sup>6</sup> 2 Curw. Hawk. 319; Wh. C. L.

7th ed. § 250.

<sup>7</sup> Wh. Prec. 10.

<sup>8</sup> Wh. C. L. 7th ed. § 258.

<sup>9</sup> 2 Hale, 181; 2 Hawk. c. 25, s.

71; State v. Irwin, 2 Blackf. 343; Com. v. Stoddard, 9 Allen, 280; Com.

To support the description of "unknown," remarks Mr. Justice Talfourd, it must appear that the name could not well have been supposed to have been known to the grand jury.<sup>1</sup> And this averment holds good even though the name of the deceased is disclosed between the finding of the bill and the trial.<sup>2</sup> "Unknown" was held sufficient where there was evidence that the party injured, a bastard child who died at twelve days old unbaptized, had been called by its mother Mary Ann.<sup>3</sup> A bastard which had never acquired a name is sufficiently identified by showing the name of its parent thus: "A certain illegitimate male child then lately born of the body of A. B. (the mother)." <sup>4</sup> A bastard must not be described by his mother's name till he has acquired it by reputation.<sup>5</sup> A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother's surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder;<sup>6</sup> but where a bastard was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment styling it "Eliza Waters," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of *Waters* by reputation.<sup>7</sup> However, in *Reg. v. Biss*,<sup>8</sup> an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and

*v. Sherman*, 13 Allen, 248; *R. v. the name of the child, or accounting for its omission.*

*Campbell*, 1 C. & K. 82; *State v. McConkey*, 20 Iowa, 574; Wh. C. L. 7th ed. § 251; *State v. Haddock*, 2 Hayw. 348; *Reed v. State*, 16 Ark. 499.

<sup>1</sup> *R. v. Stroud*, 1 C. & K. 187.

<sup>2</sup> See *Com. v. Hendrie*, 2 Gray, 503; *Com. v. Hill*, 11 Cush. 137; *Com. v. Thompson*, 2 Cush. 551; *Cheek v. State*, 38 Ala. 227; *State v. Bryant*, 14 Mo. 340.

<sup>3</sup> *R. v. Smith*, 1 Mood. C. C. 295; *S. C.* 6 C. & P. 151.

<sup>4</sup> *R. v. Mary and Jane Hogg*, 2 M. & Rob. 380. See *R. v. Hicks*, 2 Ibid. 302, where an indictment for child-murder was held bad, for not stating

<sup>5</sup> *R. v. Clark*, R. & R. 358; *Wakefield v. Mackey*, 1 Phill. R. 123, *contra*.

<sup>6</sup> *R. v. Crans*, 8 C. & P. 765.

<sup>7</sup> *R. v. Waters*, 1 Mood. C. C. 457. [N. B. No baptismal register or copy of it was produced at either trial. *Semb.*: "Eliza" would have sufficed. See *R. v. Stroud*, C. & K. 187, and cases collected; *Williams v. Bryant*, 5 M. & W. 447.] See *R. v. Clark*, R. & R. 358; *R. v. Sheen*, 2 C. & P. 634.

<sup>8</sup> 8 C. & P. 773.

wilfully, &c., did make an assault," &c. was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." It would have sufficed to state him as "a certain male child, &c., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B."<sup>1</sup>

An indictment which describes the deceased as "a certain Wyandotte Indian, whose name is unknown to the grand jury," is sufficient.<sup>2</sup>

§ 798. *When deceased has two names.* — Where a party is as usually known by one name as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name.<sup>3</sup>

§ 799. *Effect of false description.* — If a false description be added to the name, as if a female feloniously married by a man whose wife is still alive be described a "widow," when she is known to be a single woman, the error will be fatal, though no description of her was requisite.<sup>4</sup>

§ 800. *Junior or Senior.* — Where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed.<sup>5</sup> But this was held immaterial, where it is sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz. the daughter of another Elizabeth Edwards.<sup>6</sup>

§ 801. *Effects of variance in name.* — A variance in the name or identity of the party laid as injured will, at common law, entitle the prisoner to acquittal,<sup>7</sup> though such acquittal does not bar a second indictment.

§ 802. *Addition.* — It is not necessary to state the addition of

<sup>1</sup> See 2 C. & P. 635 n. See also R. v. Sheen, 2 C. & P. 634; R. v. Willes, 1 C. & K. 722.

<sup>2</sup> Reed v. State, 16 Ark. 499.

<sup>3</sup> R. v. Norton, R. & R. 509; R. v. Berriman, 5 C. & P. 601; Anon. 6 C. & P. 408; State v. Gardiner, Wright's R. 392; State v. Bell, 65 N. C. 813; O'Brien v. People, 48 Barb. 274; Kriel v. Com. 5 Bush (Ky.), 362.

<sup>4</sup> R. v. Deeley, 1 Mood. C. C. R. 303; 4 C. & P. 579.

<sup>5</sup> Singleton v. Johnson, 9 M. & W. 67.

<sup>6</sup> R. v. Peace, 3 B. & Ald. 519.

<sup>7</sup> Wh. C. L. 7th ed. § 597. As to variance in spelling, see O'Neil v. State, 48 Ga. 66; Dickinson's Q. S. 6th ed. 213.



the party killed, though it may sometimes be convenient to do so for the sake of distinction.<sup>1</sup>

§ 803. *Averment of relationship between deceased and defendant when such is necessary to offence.* — If a constable, watchman, or other minister of justice be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally of murder by malice prepense.<sup>2</sup> But where the case rests upon a neglect to provide sufficient food for the deceased, it must show that it was the duty of the prisoner to provide it.<sup>3</sup>

§ 804. *Variance as to intent to kill the particular individual killed.* — Where A. shoots into a crowd, intending to hurt or kill any one whom he may hit, and B. is killed, then A. may be indicted for the murder of B.<sup>4</sup> Where A., maliciously intending to kill B., shoots at and kills C., mistaking him for B., then A. may be indicted for the murder of C. For if A. intends to kill C., under a false impression who C. is, then malice to C. (however mistaken it may be) is made out, supposing that the intent is malicious.<sup>5</sup> But if A. shoots at B. under circumstances in which it would have been excusable homicide to have killed B., then it is excusable homicide in A. by this act to kill (without negligence) C. supposing C. to be B.<sup>6</sup>

VII. "IN THE PEACE OF GOD AND OF THE SAID (STATE) THEN AND THERE BEING."

§ 805. *Meaning of terms.* — It is not necessary to allege that the party killed was "in the peace of God and of our lord the king," &c., though such words are commonly inserted, for they are not of substance, and perhaps the truth may be that the party was at the time actually breaking the peace.<sup>7</sup> The omission of the words is no ground for arrest of judgment.<sup>8</sup>

§ 806. *Deceased must have been living at time of blow.* — As has been already seen,<sup>9</sup> it is essential in all cases to show that the

<sup>1</sup> 2 Hale, 182; Wh. C. L. 7th ed. § 250.

<sup>2</sup> R. v. Mackally, 9 Rep. 68; 1 Hale, 460; 12 Rep. 17.

<sup>3</sup> See R. v. Waters, 2 C. & K. 862; R. v. Goodwin, 1 Russ. C. & M. 563.

<sup>4</sup> Supra, § 52; R. v. Fretwell, L. & C. 443; 9 Cox C. C. 471.

<sup>5</sup> See supra, § 42; and also R. v. Holt, 7 C. & P. 519.

<sup>6</sup> Supra, § 42-48.

<sup>7</sup> 2 Hawk. P. C. c. 25, s. 73; 2 Hale, 186; 1 Hale, 438.

<sup>8</sup> Com. v. Murphy, 11 Cush. 472.

See R. v. Sawyer, R. & R. 294.

Supra, § 11.

deceased was living at the time when the alleged mortal blow was struck.

VIII. "FELONIOUSLY, WILFULLY, AND OF HIS MALICE AFORETHOUGHT" DID MAKE AN ASSAULT.

§ 807. "*Feloniously*:" "*malice aforethought*." — It is necessary to state that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*,<sup>1</sup> which, as we have already seen, is the great characteristic of the crime of murder; and it must also be stated that the prisoner *murdered* the deceased. If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c., or *killed*, or *slew* the deceased, the conviction can only be for manslaughter.<sup>2</sup>

§ 808. "*Did make an assault*." — Where the killing is alleged to have been caused by a battery, it is necessary to allege an assault.<sup>3</sup> In indictments for neglect, however, where no violence is alleged, the "assault" may be omitted.<sup>4</sup> But the term "assault" does not vitiate, though it should appear that the deceased consented to the injurious act being done.<sup>5</sup>

IX. "WITH A CERTAIN KNIFE." (MEANS OF DEATH.)

§ 809. *Statutory provisions*. — In many states the instrument of death need not be specified.

Thus, in Pennsylvania, the Revised Acts provide: —

*Indictments for murder and manslaughter*. — In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which the death of

<sup>1</sup> 2 Hale, 186, 187; Bradley v. premeditated. State v. Knouse, 39 Banks, Yelv. 205; Com. v. Gibson, Iowa, 118. In Wisconsin, under statute, "malice aforethought" need not be here used. State v. Duvall, 26 Ark. 444; Witt v. State, 6 Cold. Wisc. 415.

(Tenn.) 5. In Massachusetts the terms may be omitted as to the assault, if given afterwards as to the killing. Com. v. Chapman, 11 Cush. 492. See also R. v. Nicholson, 1 East P. C. 346; Maile v. Com. 9 Leigh, 661. In Iowa, the indictment, under the statute, must aver both assault and killing to be wilful, deliberate, and

<sup>2</sup> Wh. Prec. 7, 8; though see Anderson v. State, 5 Pike, 445.

<sup>3</sup> Lester v. State, 9 Mo. 666; Reed v. State, 8 Ind. 200.

<sup>4</sup> R. v. Plummer, 1 C. & K. 600; R. v. Crumpton, C. & M. 597; R. v. Hughes, 7 Cox C. C. 301; R. v. Friend, R. & R. 20.

<sup>5</sup> R. v. Ellis, 2 C. & K. 115.

the deceased was caused; but it shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient, in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.<sup>1</sup>

In Tennessee, neither weapon nor wound need be described.<sup>2</sup>

In Ohio a similar provision exists as to indictments for *manslaughter*.<sup>3</sup>

§ 810. *The common law rule, in pleading the instrument of death*, is, that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and character, the contrary.<sup>4</sup> Thus evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. But where the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal;<sup>5</sup> and the same if the indictment state a poisoning, and the evidence prove a starving. Thus, where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises of which he died, and it appeared in evidence that the death was by the deceased falling on the ground in consequence of a blow on the head received from the defendant; it was holden that the cause of the death was not properly stated.<sup>6</sup> But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material.<sup>7</sup> So where one kind of shot

<sup>1</sup> Rev. Act, 1860, Pamph. p. 435.

<sup>2</sup> *Alexander v. State*, 3 Heisk. 475.

<sup>3</sup> Act of May 6, 1869, § 7; Warren's Ohio Cr. L. p. 180.

<sup>4</sup> *State v. Smith*, 2 Reding. (32 Me.) 369; *State v. Fox*, 1 Dutch. (N. J.) 566; *Dukes v. State*, 11 Ind. 557; *State v. Smith*, Phil. (N. C.) L. 340; *Witt v. State*, 6 Cold. (Tenn.) 5; *Miller v. State*, 25 Wisc. 384; *R. v. Martin*, 5 C. & P. 128.

<sup>5</sup> *R. v. Briggs*, 1 Mood. C. C. 31;

*R. v. Martin*, 5 C. & P. 128.

<sup>6</sup> *R. v. Thompson*, 1 Mood. C. C. 139.

<sup>7</sup> *R. v. Mackally*, 9 Co. 67 a; Gilb. Ev. 231; *R. v. Briggs*, 1 Mood. C. C. 318. See *R. v. Culkin*, 5 C. & P. 121; *R. v. Grounsell*, 7 C. & P. 788; *R. v. Tye*, R. & R. 345; *R. v. Edwards*, 6 C. & P. 401; *R. v. Waters*, 7 C. & P. 250.

is averred and another proved.<sup>1</sup> But under an indictment for shooting with a pistol loaded with gunpowder and a leaden bullet, it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol; Bolland, B., Park and Parke, JJ., held the indictment not proved.<sup>2</sup> The same principle was applied where an indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his fist, and that the deceased fell upon a brick which caused his death.<sup>3</sup> In New York, under statute, a far more liberal rule has been announced, it having been substantially held that the use of a pistol might be proved under an indictment charging the weapon to have been a knife.<sup>4</sup> At common law, proof of striking with a gun will not sustain an averment of shooting.<sup>5</sup>

§ 811. *Wound must be shown to have been made by general mode specified.* — The evidence must show that the death was caused by the particular blow described and proved. Thus, in a case remarkable for the conflict of opinion among the assembled judges on other points, as well as for the public interest excited by the trial, all the judges concurred in the opinion, that where certain assaults were put in evidence, and relied on by the crown as being the cause of death, but where the clear surgical testimony was that the death was caused by a blow on the head, of which there was no evidence whatever, the defendants were entitled to an acquittal.<sup>6</sup>

A charge in an indictment that the offence was committed with a "*shot-gun*," does not set forth the manner and circumstances attending the use of the gun with such a certainty as would enable a defendant to make a complete defence.<sup>7</sup>

§ 812. *Allegation of compulsion through fear.* — As has been seen,<sup>8</sup> it is not material whether the force were applied to the body or the mind; but if it were the latter, it must be shown

<sup>1</sup> Goodwin v. State, 4 S. & M. 128; Gibson v. Com. 2 Va. Cases, 520. 111.

<sup>2</sup> See R. v. Hughes, 5 C. & P. 126.

<sup>3</sup> R. v. Kelly, 1 Mood. C. C. 113. See People v. Tannan, 4 Parker C. C. 514; R. v. Wrigley, 1 Lewin C. C. 127; R. v. Martin, 5 C. & Payne,

<sup>4</sup> People v. Colt, 3 Hill, 432.

<sup>5</sup> Guedell v. People, 43 Ill. 236.

<sup>6</sup> R. v. Bird, T. & M. 437; 1 Den. C. C. 94; 5 Cox C. C. 11; 15 Jur. 193.

<sup>7</sup> Edwards v. State, 27 Ark. 493.

<sup>8</sup> Supra, § 866.

that there was the apprehension of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; and it need not appear that there was no other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take.<sup>1</sup> But if the charge be that the prisoner "did compel and force" another person to do an act which caused the death of a third party, this allegation will require the evidence of personal affirmative force applied to the person in question. Thus, where it was stated in the indictment that the prisoner "did compel and force" A. and B. to leave working at the windlass of a coal mine, by means of which the bucket fell on the head of the deceased, who was at the bottom of the mine, and killed him; and the evidence was, that A. and B. were working at one handle of the windlass and the prisoner at the other, all their united strength being requisite to raise the loaded bucket, and that the prisoner let go his handle and went away, whereupon the others being unable to hold the windlass alone, let go their hold, and so the bucket fell and killed the deceased; it was held that this evidence was not sufficient to support the indictment.<sup>2</sup>

§ 813. *Ambiguity in description of instrument.*—Where an indictment describes the instrument which caused the death by two names, it is sufficient if it be proved to be either. The prisoner was indicted for manslaughter, in causing the death of a female by negligently slinging a cask which was described in the indictment as "a cask and puncheon;" and it was objected to the indictment on the ground that it was so described; but Parke, J., held, that if it was either it was sufficient.<sup>3</sup>

§ 814. *Administering poison through an irresponsible agent.*—In accordance with the reasoning already given,<sup>4</sup> the employment of an irresponsible agent does not break causal connection; and hence poison administered by such an agent, under the defendant's direction, may be laid as administered by the defendant himself.<sup>5</sup>

An indictment charged that the prisoner, a certain plaster made

<sup>1</sup> R. v. Pitts, 1 C. & M. 284; R. v. Evans, 1 Russ. C. & M. 289; R. v. Waters, 6 C. & P. 288.

<sup>2</sup> R. v. Lloyd, 1 C. & P. 301.

<sup>3</sup> Rigmondon's case, 1 Lew. 180.

<sup>4</sup> Supra, § 325, 364.

<sup>5</sup> R. v. Michael, 2 M. C. C. 120; 9 C. & P. 350.

by the prisoner of certain dangerous ingredients, feloniously did place and fix upon the head of the deceased : the prisoner was proved to have applied two plasters over the head of the deceased, but a third, which was applied last before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with materials which had been given by the prisoner to the mother for that purpose : it was objected that the indictment was not proved ; but it was held that, though indictments often go on to say, that the prisoner "caused and procured" the thing to be done, yet if the plaster was made by the direction of the prisoner, that was enough.<sup>1</sup>

Where the prisoner was charged with murder by poisoning, and the indictment stated that she *delivered* the poisoned food to the deceased, it was ruled that such allegation was proved by showing that the prisoner put the poison in some pudding meal which was in a bowl in the milk house, from whence it was taken by the deceased, as usual, to make the pudding for the family, and afterwards eaten by her.<sup>2</sup>

Of course when A. acts through B., a confederate, A. being present at the time, the act may be averred to be of A.<sup>3</sup>

§ 815. *Variance in description of poison not fatal.* — It may be generally stated that when one kind of poison is averred and another proved, the variance is not fatal.<sup>4</sup>

§ 816. *Scienter and intent to kill.* — A special *scienter* in cases of poisoning is prudent,<sup>5</sup> though in Pennsylvania, at a time when granting an *allocatur* for review was at the discretion of the court, the omission of the *scienter* (the indictment containing the averment "knowingly") was held, after conviction, not ground for an *allocatur*.<sup>6</sup> In Massachusetts, it is not necessary to aver in poisoning a specific intent to kill.<sup>7</sup>

§ 817. *Proof of one of two causes.* — Under the Massachu-

<sup>1</sup> R. v. Spiller, 5 C. & P. 333.

<sup>2</sup> R. v. Nicholson, 1 East P. C. c. 5, s. 116.

<sup>3</sup> *Infra*, § 830.

<sup>4</sup> 2 Hale P. C. 485 ; R. v. Tye, R. & R. 345 ; R. v. Culkin, 5 C. & P. 121 ; R. v. Waters, 7 C. & P. 250 ; R. v. Grounsell, *Ib.* 788 ; R. v. Martin, 5 C. & P. 128. And see R. v. Heckman, 1 D. 151 ; R. v. O'Brien, 2 C. & K.

115 ; R. v. Warman, *Ibid.* 195 ; Carter v. State, 2 Carter, Ind. 617 ; State v. Vawter, 7 Blackf. 592. As to ambiguous description of poison, see R. v. Clark, 2 B. & B. 478.

<sup>5</sup> See forms in Wh. Prec. 125 *et seq.*

<sup>6</sup> Com. v. Earle, 1 Whart. R. 525.

<sup>7</sup> Com. v. Hersey, 2 Allen, 173.

setts statute, an indictment which alleges that the death was caused by a wounding, an exposure, and a starving is not bad for duplicity, nor for failure to allege that the wounding, exposure, and starving were mortal, or of a mortal nature; and may be sustained by proof of death by any of the specified means.<sup>1</sup>

Acts which hasten the death of a person already suffering with a disease of which he must probably have soon died may be laid in an indictment for the murder, as the sole cause of the death, without mentioning the disease.<sup>2</sup> But an indictment charging the death to have been occasioned by two coöperating causes, if the evidence fail to support one of the causes, is insufficient. A count stated the death to have been caused by omitting to give the deceased proper food, and also by beating; it was held that the prisoner, being a married woman, was not legally responsible for omitting to provide food, and consequently that this count, which charged the death jointly by starving and beating, was not supported.<sup>3</sup>

§ 818. *Unknown instrument.* — If the instrument by which the homicide was committed be not known, it is enough for the indictment to aver such fact; and under the circumstances the want of specification will be excused on the same principles as allow the non-setting out of a stolen or forged paper, when such paper is lost or in the prisoner's possession.<sup>4</sup> Thus, where the fourth count of the indictment averred that the defendant, "in and upon the said G. P., feloniously, wilfully, and of his malice aforethought did make an assault, and him, the said G. P., in some way or manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, wilfully, and of malice aforethought deprive of life; so that he, the said G. P., then and there died," this was sustained by the supreme court of Massachusetts. "The rules of law," said Chief Justice Shaw, when charging the jury, "require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and if the circumstances will not per-

<sup>1</sup> Com. v. Macloon, 101 Mass. 1.

<sup>4</sup> Wh. C. L. § 811, 1064; State v.

<sup>2</sup> Com. v. Fox, 7 Gray, 585; State v. Morea, 2 Ala. 275. See however R. v. Stockdale, 2 Lew. 220; and see supra, § 12, 360.

Williams, 7 Jones N. C. 446; People v. Cronin, 34 Cal. 191 — aff. in People v. Martin, 47 Cal. 96; State v. Wood, 53 N. H. 484.

<sup>3</sup> R. v. Sanders, 7 C. & P. 277.

mit of a fuller and more precise statement of the mode in which the death is occasioned, this count conforms to the rules of the law."<sup>1</sup>

§ 819. *Inconsistent counts.*— In one count of an indictment for murder, the death was stated to be by a blow of a stick, and, in another, by the throwing of a stone. The jury found the prisoners guilty of manslaughter generally, on both counts, and the judges held the conviction right, and that judgment could be given upon it; and it was said, that these are not inconsistent statements of the modes of death, but that, if they had been so, no judgment could have been given on the verdict.<sup>2</sup> In this country, the practice is to take a verdict of guilty if either count is sustained by the evidence, no matter how inconsistently the instrument may be stated in other counts.<sup>3</sup> The proper course, no doubt, is to take the verdict on the count sustained by the evidence. Yet, even after a general verdict of guilty, the counts containing the misdescription may be removed by *nolle prosequi*, and judgment entered on the good count.

#### X. "OF THE VALUE OF."

§ 820. The allegation of value is now immaterial, and need not be proved.<sup>4</sup> In England, where deodands are still recognized, it may be necessary to introduce it; though as this provision does not exist in this country the reason fails.<sup>5</sup>

#### XI. "WHICH HE, THE SAID A. B., IN HIS RIGHT HAND THEN AND THERE HAD AND HELD," AND HEREIN OF JOINDER OF DEFENDANTS.

§ 821. Though the hand in which the instrument was held is set out in the old forms, it is clearly not necessary to prove the allegation.<sup>6</sup>

§ 822. *Defendant acting through confederate.*— If several be charged as principals, one as principal perpetrator, and the

<sup>1</sup> Bemis's Webster's case, 473; Com. v. Webster, 5 Cush. 585. An indictment for involuntary manslaughter must specify means. Willey v. State, 46 Ind. 363.

<sup>2</sup> R. v. O'Brien, 2 C. & K. 115; 1 Den. C. C. 9.

<sup>3</sup> Lanergan v. People, 39 N. Y. 39; State v. Baker, 63 N. C. 276. See

infra, § 857, 906; People v. Davis, 56 N. Y. 95. And as to varying the agency of defendant, R. v. O'Brien, *ut supra*; People v. Valencia, 43 Cal. 552; infra, § 857.

<sup>4</sup> 1 East P. C. s. 108, p. 341.

<sup>5</sup> Hale's Pleas of the Crown, by Messrs. Stokes & Ingersoll, i. 424.

<sup>6</sup> Arch. C. P. 10th ed. 407.



others as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present is, in legal consideration, the injury of each and every one of them.<sup>1</sup>

§ 823. *Defendant acting through irresponsible agent.* — In such case the act can be laid as done by the defendant himself.<sup>2</sup>

XII. "HIM, THE SAID E. F., IN AND UPON THE RIGHT BREAST OF THE SAID E. F."

§ 824. The "him" which is here inserted is not usually introduced; and counts have been sustained without it, where the express exception was taken.<sup>3</sup>

Where the indictment charged the death by cutting the throat, and a surgeon proved that the jugular vein was divided, but not the carotid artery, and that what he called the throat was not cut, the wound not having extended so far round the neck; it was held that this was sufficient, for the term throat meant not that part of the throat which was scientifically called the throat, but that which was commonly called the throat.<sup>4</sup>

It has been held that a count in an indictment for murder, charging that the prisoner did strike the deceased on the *left* temple, giving him a mortal wound on the *right* temple, &c., is inconsistent and void.<sup>5</sup> The count must state the part of the body to which the violence was applied; but the proof need not correspond with such statement.<sup>6</sup> It is not necessary to aver the *part* of the breast struck.<sup>7</sup>

XIII. "THEN AND THERE FELONIOUSLY, WILFULLY, AND OF HIS MALICE AFORETHOUGHT."

§ 825. The time need not be formally repeated: "then and there" carries the averment back to the original date.<sup>8</sup> Even if the "then and there" be omitted, it would seem that the court will still give judgment on the indictment if the grammatical construction be such as to apply the time at the outset

<sup>1</sup> Foster, 551; 1 East P. C. 350; State v. Fley, 2 Brev. 338; State v. Mairs, 1 Cox, 453; Com. v. Chapman, 11 Cush. (Mass.) 422; State v. Jenkins, 14 Rich. (S. C.) L. 215; R. v. O'Brien, 1 Den. C. C. 9; 2 Car. & Kir. 115; supra, § 841; infra, § 830.

<sup>2</sup> See supra, § 814.

<sup>3</sup> Com. v. White, 6 Binn. 183.

<sup>4</sup> R. v. Edwards, 6 C. & P. 401.

<sup>5</sup> Dins v. State, 7 Blackf. 20.

<sup>6</sup> Ibid.

<sup>7</sup> Thompson v. State, 26 Tex. 523; infra, § 834.

<sup>8</sup> Wh. C. L. 7th ed. § 272.

to the subsequent allegations.<sup>1</sup> But where two distinct periods have been averred, the statement "then and there" is not enough; one particular time should be averred.<sup>2</sup>

It has been said that, in an indictment charging "that A. feloniously and of his malice aforethought assaulted B., and with a sword, &c., then and there struck him," &c., the first allegation of feloniously and of his malice aforethought, applied to the assault, runs also to the stroke to which it is essential,<sup>3</sup> though the point has elsewhere been determined otherwise.<sup>4</sup>

A charge that A., on such a day, at, &c., made an assault upon B., and him with a knife feloniously struck, killed, and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault, for want of the words "then and there;" and for this and other exceptions an outlawry on this charge was reversed.<sup>5</sup>

An indictment against two which charges an injury done by one of them on one day, and another injury done by the other on another day, and that the death arose from both, is bad, when there is no averment that the one was present when the act was done by the other. An inquisition stated that Devett, on the 27th of May, struck the deceased on the head with a poker, and gave her one mortal bruise and contusion, and that Fox, on the 23d of June, kicked the deceased with her foot, and gave her thereby one mortal bruise and contusion, of which said mortal bruise and contusion so given by Devett, as well as of the mortal bruise and contusion so given by Fox, she languished, and afterwards of the said mortal bruises and contusions died: it was held that this inquisition could not be sustained.<sup>6</sup>

XIV. "DID STRIKE AND THRUST, GIVING TO THE SAID R. F. THEN AND THERE, WITH THE KNIFE AFORESAID."

§ 826. *Importance of word "strike."* — Wherever death is caused by a blow, it is essential to the indictment that it should allege that the defendant struck the deceased;<sup>7</sup> and this must also be proved; though in Virginia it has been ruled that

<sup>1</sup> State v. Cherry, 8 Murph. 7; Com. v. Bugbee, 4 Gray, 206.

<sup>5</sup> 1 East P. C. c. 5, s. 112, p. 343;

<sup>2</sup> Hawk. P. C. c. 23, s. 90; 2 Inst.

<sup>3</sup> Storrs v. State, 3 Miss. 45; Wh. C. L. 7th ed. § 272.

318.

<sup>6</sup> R. v. Devett, 8 C. & P. 639.

<sup>7</sup> State v. Owen, 1 Murph. 452.

<sup>1</sup> See 5 Co. 122 a; 2 Hale, 181; 1

<sup>4</sup> Resp. v. Honeyman, 2 Dallas, 288. Hawk. c. 23, s. 82.

where the instrument was a dagger, "stab, stick, and thrust" would be held equivalent to strike; and such is no doubt the general rule.<sup>1</sup> It is not necessary, however, as has been seen, to prove that he struck him with the particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only would maintain the indictment.<sup>2</sup>

An indictment charging "that A. B. with a certain stick, &c., in and upon the head and face of C. D., then and there did strike and beat, giving to the said C. D. then and there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle giving, and the words then and there, connect the allegation with the mortal wound in the second clause.<sup>3</sup>

§ 827. Where the indictment charged that the prisoners *with certain stones* of no value, which they in their right hands then and there had and held, in and upon the back part of the head of him, the said W. W., then and there feloniously, &c., and of their malice aforethought, *did cast and throw*, and that they with the stones aforesaid, so as aforesaid cast and thrown, the said W. W., in and upon the back part of the head of him the said W. W., feloniously, &c., did strike, &c., an objection was taken that the mode of causing the death was not properly stated. But the judges, upon a case reserved, were unanimously of opinion that the cause of the death was sufficiently stated; it being clear that the *stones* were what were cast and thrown at the deceased; and the word *with* might be rejected, or the words *cast and throw* might be considered to be used as neuter verbs.<sup>4</sup>

§ 828. An indictment charging "that the defendant, with a certain stone which he held in his right hand, in and upon the right side of the head of the deceased, feloniously, &c., did cast and throw, and that the defendant with the stone aforesaid, so as aforesaid cast and thrown, the deceased in and upon the right side of the head feloniously did strike," &c., was held to contain

<sup>1</sup> Gibson v. Com. 2 Va. Cases, 111.

<sup>2</sup> State v. Owen, 1 Murph. 452.

<sup>3</sup> Arch. C. P. 10th ed. 486. See supra, § 811.

<sup>4</sup> R. v. Dale, 1 R. & M. C. C. 5. See White v. Com. 6 Bin. 179.

a sufficient allegation that the defendant threw the stone and struck the deceased with it.<sup>1</sup>

§ 829. "*Shoot off and discharge*" is sufficient in gunshot wounds.<sup>2</sup>

§ 830. *Striking by confederate.* — If A. be indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appear that B. gave the stroke, and A. and C. were aiding and assisting, or it be proved which gave the stroke, the charge, as has been already fully seen, is proved, for in law it is the stroke of all.<sup>3</sup> So if a prisoner be indicted for strangling the deceased with her own hands, and upon the evidence it turns out that the deceased was strangled by some one else in the presence of the prisoner, who was privy to it, and so near as to be able to assist, that is sufficient.<sup>4</sup>

§ 831. As has been seen,<sup>5</sup> what A. does through an irresponsible agent may be averred to be done by A. himself.

§ 832. "*Strike*" not necessary when poison or other modes of death, not involving wounds, are used. — Where the nature of the injury does not admit of the averment of a stroke, it is enough if the artificial cases themselves are correctly enumerated. Thus, where the indictment alleged in several counts that the prisoner administered noxious and deleterious substances to the deceased, and that he died of the sickness occasioned thereby; and the evidence was that the prisoner had administered to the deceased, while ill of small-pox, large quantities of Morrison's pills, and his death was thereby accelerated: it was objected that the indictment was not supported by the evidence, which proved nothing more than that the deceased died of a natural disorder, accelerated by improper treatment; that the charge in the indictment was a different one, namely, that the party died solely of a mortal sickness caused by the medicine and improper treatment; that the indictment was framed as though the small-pox had nothing to do with the cause of death; and yet that there was no evidence whatever to show that the party would have died but for that distemper: it was answered that it was not necessary to

<sup>1</sup> Com. v. White, 6 Bin. 183. So also Turns v. Com. 6 Metc. (Mass.) 225.

<sup>2</sup> State v. Freeman, 1 Spears, 57.

<sup>3</sup> Supra, § 819; 1 Russ. on Cr. 510;

<sup>4</sup> Hale, 462.

<sup>5</sup> R. v. Culkln, 5 C. & P. 121.

<sup>6</sup> Supra, § 814.

allege more than the act with which the prisoner was charged ; that it was not the practice to allege the state of body in which the deceased might be, however much that state of body might assist to render the act of the prisoner fatal ; and the indictment was held good, as all the witnesses agreed that the death was accelerated by the pills.<sup>1</sup>

§ 833. In a case where the death proceeded from suffocation, the judges held, that when the primary cause of the suffocation *was the forcing the moss* into the throat of the child, it was not necessary to state in the indictment the intermediate process, viz. the swelling up of the passage of the throat, which occasioned the suffocation, such swelling having arisen by forcing the moss into the throat.<sup>2</sup>

XV. "IN AND UPON THE SAID LEFT SIDE OF THE HEART OF HIM THE SAID E. F."

§ 834. The indictment must show in what part of the body the wound was inflicted, but if the wound be stated to be on the right side, and be proven to be on the left, the variance is not fatal.<sup>3</sup>

"Upon the body," is a sufficient averment of location.<sup>4</sup>

XVI. "ONE MORTAL WOUND OF THE BREADTH OF THREE INCHES, AND OF THE DEPTH OF ONE INCH."

§ 835. *Term "mortal" essential.* — The wound must be alleged to have been mortal.<sup>5</sup>

§ 836. *What a "wound" is.* — A wound, in criminal issues, has been defined to be an injury to the person, by which the skin is broken.<sup>6</sup> Under the English statute making "wounding" indictable, it was said by Coleridge, J., that the whole skin must be broken.<sup>7</sup> But it is sufficient if internal injury be given by the concussion, though the outer skin be not broken.<sup>8</sup>

<sup>1</sup> R. v. Webb, 2 Lewin, 196 ; S. C. 1 M. & Rob. 405. See supra, § 815.

<sup>5</sup> R. v. Lad, 1 Leach, 96 ; State v. Conley, 39 Me. 98.

<sup>2</sup> R. v. Tye, Russ. & Ry. 345.

<sup>6</sup> Moriarty v. Brooks, 6 C. & P.

<sup>3</sup> 2 Hale, 186 ; Archb. C. P. 384 ; Dias v. State, 7 Blackf. 20 ; supra, § 824.

684 — by Lyndhurst, C. B. ; R. v. Beckett, 1 M. & Rob. 526 — Parke, J.

<sup>7</sup> R. v. McLoughlin, 8 C. & P. 635.

<sup>4</sup> Sanchez v. People, 8 E. P. Smith, 147 ; Whelchell v. State, 23 Ind. 89. See People v. Davis, 56 N. Y. 95 ; supra, § 824.

<sup>8</sup> R. v. Smith, 8 C. & P. 173 ; R. v. Waltham, 3 Cox C. C. 442 ; State v. Leonard, 22 Mo. (1 Jones) 449. See Wh. C. L. 7th ed. § 3469.

§ 887. *Exactness no longer necessary in description of wound* — It was formerly held to be necessary to insert a full description of the wound.<sup>1</sup> The present rule, however, is to require no such particularity.<sup>2</sup>

§ 888. Where the death was occasioned by a bruise, a description of its dimensions, &c., is clearly not necessary.<sup>3</sup>

§ 889. Where an indictment stated the length and breadth of a wound, but not the depth, and it was objected that as there was only one wound, the depth ought to be stated; it was held that it was not necessary, for if common sense did not require it where there were several wounds, common sense did not require it where there was only one.<sup>4</sup> So where an indictment merely alleged the giving of "one mortal bruise," and it was urged that the dimensions of the bruise ought to have been described, Mr. J. Parke said: "I am disposed to go further than the judges in Mosley's case, and to say that it is not necessary to describe the bruise at all, such rule being, in my judgment, most consistent with common sense."<sup>5</sup>

Even as to an incised wound, the dimensions need no longer be set forth.<sup>6</sup>

<sup>1</sup> 2 Hale, 185, 186; 2 Hawk. P. C. c. 23, s. 80, 81; Trem. Ent. 10; Staundf. 78 b, 79 a; 4 Co. 40, 41; 5 Co. 120, 121 b, 122; Cro. Jac. 95; Stark. Cr. L. 375, 380.

<sup>2</sup> R. v. Mosley, 1 M. C. C. 97.

<sup>3</sup> State v. Owen, 1 Murph. 452. See State v. Moses, 2 Dev. 452, *contra*.

<sup>4</sup> R. v. Tomlinson, 6 C. & P. 379.

<sup>5</sup> Turner's case, 1 Lewin, 177.

<sup>6</sup> Lazier v. Com. 10 Grat. 708; Stone v. People, 2 Scam. 326; Com. v. Chapman, 11 Cush. (Mass.) 422; Dillon v. State, 9 Ind. 408; State v. Conley, 39 Maine (4 Heath), 78; Turner's case, 1 Lewin, 177. In Com. v. Woodward, 102 Mass. 159, Wells, J., speaking of the old rule, said: "We fail to discover any sound principle on which the rule can stand, to justify its perpetuation. We do not suppose that, in the case of Commonwealth v. Chapman, the indictment would have failed for a variance, if the proof had

been of an incised wound. Where the blow was with a blunt instrument, which broke through the skin, the wound would be properly described as a bruise or an incised wound. Under the St. 9 Geo. 4, c. 31, against injuries with intent to murder, maim, &c., the proof of a 'wounding' was required to be of an incision through the skin. Rosc. Crim. Ev. (6th ed.) 890. A particular description of the wound cannot be necessary to enable the defendant to know for what injury he is called upon to answer. If required for this purpose it would be valueless, because the allegation need not be accurate in correspondence with the proof. The statement of the general nature and locality of the wound, and the instrument by which it was inflicted, are all that can be required for this purpose." See State v. Moses, 2 Dever. 452, *contra*, afterwards corrected by statute. So in Indiana no

§ 840. An indictment for manslaughter, which avers that the death ensued from "one mortal wound" given on the left side of the head of the deceased by a stroke with a whipstock, is sufficient without a more specific description of the wound.<sup>1</sup>

§ 841. In all these cases it should be remembered that, even when it is considered necessary to state the manner and place of the hurt, and its nature, in order that the indictment might be good as to its formality; yet, if it appeared upon the evidence that the party died of another kind of wound, in another place, the indictment is nevertheless maintainable.<sup>2</sup>

§ 842. An indictment which states the death to have been caused by means of ravishing an infant, but omits to aver that a mortal wound or bruise was given, is defective.<sup>3</sup>

§ 843. *When two wounds are averred either may be proved.*—Where an indictment for murder charged the defendant with having shot the deceased in the head, breast, and side, giving to him one mortal wound, of which mortal wound he then and there instantly died, it was held, that if either of the wounds described proved mortal, the indictment would thereby be sustained;<sup>4</sup> and this results from the principle that proof of either mortal wound is sufficient. Thus, on the trial of an indictment for murder, charging the killing to have been effected by shooting the deceased in the head, it being proved that there were two bullet wounds, one in the head and the other in the body, either of which would produce death, the refusal of the court to charge, that "if the proof fails to show which wound it was that actually killed, the case is not made out according to the indictment," is not error.<sup>5</sup>

XVII. "OF WHICH SAID MORTAL WOUND THE SAID E. F., FROM, ETC., TO, ETC., AT, ETC., DID LANGUISH, AND LANGUISHINGLY DID LIVE."

§ 844. This averment is a mere matter of surplusage, and may be entirely stricken out.<sup>6</sup>

description is necessary by statute. *Jones v. State*, 35 Ind. 122.

<sup>1</sup> *Com. v. Woodward*, 102 Mass. 159.

<sup>2</sup> 2 Hale, 185, 186; 2 Hawk. P. C. c. 23, s. 81; *Dias v. State*, 7 Blackf. 20.

<sup>3</sup> *R. v. Lad*, 1 Leach, 38; S. C. 1 C. & Mars. 345.

<sup>4</sup> *Hamby v. State*, 36 Texas, 523.

<sup>5</sup> *Real v. People*, 3 Hand (42 N. Y.), 270.

<sup>6</sup> *Penn. v. Zell*, Addison, 171, 175; *State v. Conley*, 39 Me. 78.

XVIII. "ON WHICH SAID, ETC., AT, ETC., OF THE WOUND AFORESAID DID DIE."

§ 845. *Death must appear to have been within a year and a day of the wound.*<sup>1</sup>—Thus an indictment, upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause.<sup>2</sup> The date of the death, therefore, as well as that of the stroke, must distinctly appear.<sup>3</sup> Variance as to either, however, with the qualification just announced, is not fatal.<sup>4</sup> The averment that the defendant "killed" the deceased on a certain day, implies that the latter died on such day,<sup>5</sup> and it is enough to say that the deceased "then and there died."<sup>6</sup>

The general effect of the averment "then and there" is considered in another work.<sup>7</sup>

§ 846. *Place must be averred.*—The indictment at common law should also aver that the deceased died in the county in which the indictment is found.<sup>8</sup>

Where the stroke was at one time or place, and the death at another, if the day be specially alleged, it should be that on which the party died, and not that on which he was stricken; for until he died it was no murder.<sup>9</sup>

§ 847. *Connection between injury and death must be averred.*—An indictment which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and "of the said mortal sickness died," is good, without also stating that the deceased died of the poisoning.<sup>10</sup> It is enough to allege that the deceased died of the wound. It is

<sup>1</sup> See supra, § 15.

<sup>2</sup> State v. Orrell, 1 Dev. 139; People v. Aro, 6 Cal. 207; People v. Kelley, 6 Cal. 210.

<sup>3</sup> State v. Conley, 39 Me. 78.

<sup>4</sup> Wh. Cr. L. 7th ed. § 261, 599; State v. Haney, 67 N. Car. 467.

<sup>5</sup> State v. Ryan, 13 Minn. 371.

<sup>6</sup> State v. Haney, 67 N. Car. 467.

<sup>7</sup> Wh. Cr. L. 7th ed. 272.

<sup>8</sup> 2 Hawk. b. 2, c. 25, a. 36; 1 Ch.

C. L. 178; 3 Ibid. 732; State v. Orrell, 1 Dev. 139; Com. v. Linton, 2 Va. Cases, 205. See this point discussed supra, § 793; and see Wh. Cr. L. 7th ed. § 699, 710, 1052; People v. Cox, 9 Cal. 32; Riggs v. State, 26 Miss. 51.

<sup>9</sup> 1 East P. C. c. 5, s. 117, p. 347.

<sup>10</sup> R. v. Sandys, 1 Car. & Mara 345; 2 Mo. C. C. 227. See supra, § 814, 817.



not necessary to aver that he died of the stroke.<sup>1</sup> Where an indictment charged a prisoner with having inflicted upon the deceased a mortal wound, of which mortal wound he did languish, and languishing did live, "on which said 20th day of June, in the year aforesaid, the said Richard O'Leary, in the county aforesaid, died," it was held, that it sufficiently charged that the deceased then died of the mortal wound inflicted by the prisoner.<sup>2</sup>

§ 848. *Mode of averring time.*<sup>3</sup>—A coroner's inquisition merely alleging that the deceased of the said mortal shock, "at the parish aforesaid, in the county aforesaid, *instantly* died," is bad.<sup>4</sup>

An indictment stated that the mortal wound was inflicted on the 7th November, 1845, and that the deceased languished on until the 8th November in the year aforesaid, and then said: "On which 8th day of *May*, in the year aforesaid, the deceased died." To this indictment the prisoner pleaded not guilty. It was held, that the insertion of May for November was a mistake, apparent on the face of the indictment, and would not exclude proof of the death subsequent to the 7th November, or be cause for arresting the judgment.<sup>5</sup>

An indictment against two defendants, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad.<sup>6</sup>

XIX. "AND SO THE JURORS AFORESAID, ETC., DO SAY, THAT THE SAID A. B., HIM THE SAID E. F., IN MANNER AND FORM AFORESAID, FELONIOUSLY, WILFULLY, AND OF HIS OWN MALICE AFORETHOUGHT DID KILL AND MURDER."

§ 849. The concluding averment "and so the jurors do say," does not require either time or place to be alleged in it.<sup>7</sup>

§ 850. *Malice aforethought.*—In an indictment for murder, it is indispensable that the killing and murder should be charged to be done "with malice aforethought."<sup>8</sup> In Arkansas, however, it seems to have been thought that the words "and wickedly did

<sup>1</sup> State v. Conley, 39 Me. 78; R. v. Sandys, *ut supra*.

<sup>2</sup> Lutz v. Com. 29 Penn. St. 441.

<sup>3</sup> See Com. v. Ailstock, 3 Grat. 650.

<sup>4</sup> R. v. Brownlow, 11 A. & E. 119.

<sup>5</sup> Com. v. Ailstock, 3 Grat. 650.

<sup>6</sup> R. v. Devitt, 8 C. & P. 639.

<sup>7</sup> R. v. Nicholas, 7 C. & P. 538.

<sup>8</sup> Com. v. Gibson, 2 Va. C. 70; Com. v. Chapman, 11 Cush. 422; R. v. Nicholson, 1 East P. C. 346; Malle v. Com. 9 Leigh, 66. See as to other cases, and the rule in Iowa and Wisconsin, *supra*, § 807.

kill and murder, against," &c., are sufficient, without the words "of his malice aforethought."<sup>1</sup>

§ 851. *Deceased's name must be repeated.* — Omitting the name of the deceased in such conclusion, is fatal.<sup>2</sup>

§ 852. *Averment as to principal and accessory.* — Where an inquisition, after correctly charging the principal in the first degree, alleged that the two other prisoners, at the time of the felony aforesaid "(to wit) on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, were feloniously present then and there abetting, aiding, and assisting the said N.," &c. it was objected that the word "feloniously" only applied to "present," and not to "abetting, aiding, and assisting;" and it was held that the inquisition was bad on this ground.<sup>3</sup>

#### XX. "CONTRARY TO THE FORM, &c."

853. The law on this topic belongs to the general subject of criminal pleading, and need not be here recapitulated.<sup>4</sup>

#### XXI. DISTINCTIVE FEATURES OF MANSLAUGHTER.

§ 854. Where the bill of indictment is found by the grand jury a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the English course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder," and to leave only so much as makes the bill to be one for manslaughter;<sup>5</sup> and this appears to be the practice at the present time upon some of the circuits; but the usual course in this country is, unless the emergency of the case prevents it, to present a new bill to the grand jury for manslaughter. And in England a learned judge went so far as to say that this should be done where the grand jury have returned manslaughter upon a bill for murder, saying he thought it the better course to prefer a new bill, although the usual course on the circuit had been to alter the bill for murder, on the finding of the grand jury.<sup>6</sup>

§ 855. Though the same indictment may charge one with

<sup>1</sup> Anderson v. State, 5 Pike, 445.

<sup>2</sup> R. v. Nicholas, 7 C. & P. 538. See

<sup>3</sup> Dias v. State, 7 Blackf. 20; R. v. supra, § 830; infra, § 857.

Phelps, 1 Russ. on Cr. 564; 1 C. & Mars. 180.

<sup>4</sup> See Wh. C. L. 7th ed. § 410.

<sup>5</sup> 2 Hale, 162.

<sup>6</sup> 1 Turner's case, 1 Lew. 176.

murder and another with manslaughter, yet if it charged both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter.<sup>1</sup>

§ 856. The indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and "murder;" and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion.<sup>2</sup>

If a person be indicted as accessory after the fact to a murder, he may be convicted as accessory after the fact to manslaughter, if the offence of the principal turns out to be manslaughter.<sup>3</sup> Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessory after the fact.<sup>4</sup>

Under the Indiana practice, an indictment for involuntary manslaughter must specify the means of killing.<sup>5</sup>

## XXII. JOINDER OF COUNTS.

§ 857. This topic, being common to indictments generally, is discussed at large in another work.<sup>6</sup> It is sufficient here to repeat that counts varying the statements of the mode of death are constantly sustained;<sup>7</sup> and that in an indictment for murder charging in one count A. as principal and B. as accessory before the fact, and in another count B. as principal and A. as accessory before the fact, charges but one offence, such counts are not repugnant.<sup>8</sup>

<sup>1</sup> 1 East P. C. p. 347.

<sup>2</sup> 1 Russ. C. & M. 584.

<sup>3</sup> R. v. Greenacre, 8 C. & P. 35.

<sup>4</sup> Ibid.

<sup>5</sup> Willey v. State, 46 Ind. 363

<sup>6</sup> Wh. C. L. 7th ed. § 414, § 176.

<sup>7</sup> Supra, § 816.

<sup>8</sup> Whart. C. L. 7th ed. § 430; People v. Valencia, 43 Cal. 552.

## CHAPTER XXIII.

### PLEAS.

#### I. ACQUITTAL OR CONVICTION OF MANSLAUGHTER AS A BAR TO INDICTMENT FOR MURDER, § 861.

#### II. ONCE IN JEOPARDY, § 863.

Constitutional provision, § 864.

Where the separation of the jury, except from necessity, is a bar, § 865.

Pennsylvania, § 866.

Virginia, § 869.

North Carolina, § 870.

Tennessee, § 871.

Alabama, § 872.

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Where the separation of the jury, when it takes place in the exercise of a sound discretion, is no bar, § 874.

Federal courts, § 875.

Massachusetts, § 876.

New York, § 877.

Maryland, § 878.

Mississippi, § 879.

Illinois, § 880.

Ohio, § 881.

Indiana, § 882.

Iowa, § 883.

Texas, § 883.

Kentucky, § 884.

Georgia, § 885.

Nebraska, § 885.

Missouri, § 886.

In either view, agreed that there is no jeopardy on a defective indictment, § 887.

Generally illness or death of juror is sufficient ground for discharge, § 888.

Mistake of law by judge, § 889.

Sickness of prisoner, § 890.

Statutory close of court, § 891.

Sickness or death of judge, § 892.

Sickness or incapacity of witness, § 893.

Until jury are "charged" jeopardy does not begin, § 894.

Consent of prisoner to discharge, § 895.

§ 860. THE general law as to pleas it is not necessary here to state. Two points, however, which are special to homicide trials, require distinctive notice.

#### I. ACQUITTAL OR CONVICTION OF MANSLAUGHTER AS A BAR TO INDICTMENT FOR MURDER.

§ 861. A man who had been convicted of manslaughter, and has had his clergy allowed, might in the old English law have pleaded *autrefois convict* to an indictment, charging the same death upon him as a murder.<sup>1</sup> And it is clear that *autrefois convict* of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder. And *autrefois acquit* or *autrefois attain*, upon an indictment for murder, has been held a good plea to an indictment charging the same death as petit treason.<sup>2</sup>

<sup>1</sup> 1 Russ. on Cr. 565.

<sup>2</sup> 2 Hale, 246; Fost. 329. See R. v. Jennings, R. & R. 388.

§ 862. In this country there has been some fluctuation of opinion; and it has been sometimes thought that a defendant who was convicted of manslaughter might subsequently, on a new trial being given on his application, be put on his trial for murder. But the true view is that a conviction of manslaughter on an indictment for murder is an acquittal of murder; and that the defendant cannot afterwards be put on his trial for such murder.<sup>1</sup>

On the same reasoning a conviction of murder in the second degree is an acquittal of murder in the first degree.<sup>2</sup>

## II. ONCE IN JEOPARDY.

§ 863. This may be regarded as a plea peculiar to capital cases, as in them only, so far as concerns the points in which this plea differs from *autrefois acquit*, can it be interposed. Remanding the plea of *autrefois acquit*, therefore, to discussion in another treatise, a few observations will now be made on the plea of once in jeopardy.

§ 864. *Constitutional provision.*—By the Constitution of the

<sup>1</sup> *Infra*, § 898; *Slaughter v. State*, 6 Humph. 410; *Hurt v. State*, 25 Miss. 378; *People v. Gilmore*, 4 Cal. 376; *Brennan v. People*, 15 Ill. 511; *Jordan v. State*, 22 Ga. 545; *Bell v. State*, 48 Ala. 685; *State v. Smith*, 53 Mo. 139; *State v. Ross*, 29 Mo. 32. See *Com. v. Horthy*, 109 Mass. 348; *State v. Lessing*, 16 Minn. 75; *Clem v. State*, 42 Ind. 420; *People v. Knapp*, 26 Mich. 216; *State v. Martin*, 30 Wisc. 216; Wh. C. L. 7th ed. § 560, 563, 1119. This, however, has not been the unbroken practice. Of this a striking illustration is given in the address of Mr. Justice Grier, of the supreme court of the United States, to a party of prisoners who applied for a new trial after having been convicted of manslaughter in the circuit court of the United States, in Philadelphia, in 1848: "But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives

may become forfeit to the law. If you choose to run this risk, and again to put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you." *U. S. v. Harding*, 1 Wall. J. 127.

To the same effect is *State v. McCord*, 8 Kans. 232, where the defendant was convicted of manslaughter on an information for murder, and obtained a new trial. The statute provided that "the granting of a new trial places the parties in the same position as if no trial had been had." It was held, that the defendant had waived the constitutional safeguard against being twice put in jeopardy, and on the second trial could be convicted of murder.

<sup>2</sup> *State v. Smith*, 53 Mo. 139, and cases cited above. See *infra*, § 898.

United States it is provided : " Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb ;<sup>1</sup> and a similar restriction exists in the constitutions of most of the states.

In several of our American jurisdictions this provision is regarded as simply affirming the common law doctrine that a conviction or acquittal, on a valid indictment, is a bar to a second indictment for the same offence. In other jurisdictions, however, the constitutional provision has been held to extend beyond the common law sanction ; and to require that where a jury in a capital case has been discharged without consent before verdict, after having been sworn and charged with the offence, the defendant, under certain limitations, may bar a second prosecution by a special plea setting forth the fact that his life has already been put in jeopardy for the same offence.<sup>2</sup> Keeping this distinction in view, the case may be divided in two general classes : First. Where the separation of the jury in a capital case, except from necessity, is held a bar to all subsequent proceedings. Secondly. Where it is held that the discharge of the jury is a matter of sound discretion for the court, and that when, in the exercise of a sound discretion, this discharge takes place, it presents no impediment to a second trial.<sup>3</sup>

§ 865. *Where the separation of a jury, except from necessity, is a bar.*—The first view has been taken by the courts of Pennsylvania, Virginia, North Carolina, California, Tennessee, and, to a qualified degree, of Alabama.

§ 866. *Pennsylvania.*—In 1822, the question was brought before the supreme court of Pennsylvania (a state whose constitution contains a provision precisely the same as that in the Constitution of the United States), in a case where the defendant pleaded specially, that the jury had been discharged on a former trial because they were unable to agree. The court held, that the discharge of the jury, because they could not agree, was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Chief Justice Tilghman said, where a party

<sup>1</sup> Const. U. S. Amend. art. 3.

Devereux, 491 ; Ned v. State, 7 Porter, 187.

<sup>2</sup> William's case, 2 Grat. 567 ; Com. v. Cook, 6 S. & R. 577 ; Com. v. Clue, 3 Rawls, 498 ; State v. Garrigues, 1 Hayw. 241 ; Spier's case, 1

<sup>3</sup> For a discussion of the general question how far a jury may be allowed to separate, see Whart. Cr. L. 7th ed. § 3111, &c.

"is tried and acquitted on a bad indictment, he may be tried again, because his life was not in jeopardy. The court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation. I grant that in case of necessity they (the jury) may be discharged; but if there be anything short of absolute necessity, how can the court, without violating the constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?"<sup>1</sup>

In 1831, in a case where the defendant interposed a similar plea, the doctrine was pushed by the same court still further. It was argued by Gibson, C. J., with his usual vigor, that "no discretionary power whatever exists with the court in such a case to discharge."<sup>2</sup>

§ 867. In a later case (April, 1851), however, where the jury were allowed to separate by consent, *after* being sworn, but *before* the case was opened, the court, while reversing the judgment, remanded the prisoner for another trial.<sup>3</sup> "The law is undoubtedly settled," said Gibson, C. J., "that a prisoner's consent to the discharge of a previous jury is an answer to a plea of a former acquittal."

§ 868. It has since been held that the plea of "once in jeopardy for the same offence" will not avail where the jury were discharged on account of disagreement, in a charge of burglary.<sup>4</sup>

§ 869. *Virginia*.—In Virginia, mere inability to agree is not such a necessity as will justify the court in discharging a jury, and in such case the defendant cannot be again put in jeopardy;<sup>5</sup> though where, after nine days' confinement, one of the jurors suffered materially in health, it was held that the jury were properly discharged, and the second trial was regular.<sup>6</sup>

§ 870. *North Carolina*.—The same question came before the supreme court of North Carolina, in a very early case,<sup>7</sup> and again at a much later period,<sup>8</sup> where it was alleged that the jury in a

<sup>1</sup> *Com. v. Cook*, 6 Serg. & Rawle, 577; but see *Com. v. McFadden*, 11 Harris, 12; Wh. C. L. 7th ed. § 590, 3168, 3283, 3308.

<sup>2</sup> *Com. v. Clue*, 3 Rawle, 498.

<sup>3</sup> *Peiffer v. Com.* 3 Harris, 468.

<sup>4</sup> *McCreary v. Com.* 29 Penn. State R. 323.

<sup>5</sup> *Williams v. Com.* 2 Grattan, 568.

<sup>6</sup> *Com. v. Fells*, 9 Leigh, 613.

<sup>7</sup> *State v. Garrigues*, 1 Hayw. 241.

<sup>8</sup> *Spier's case*, 1 Dever. 491.

capital case had been discharged without legal necessity, having given no verdict. The court held that the prisoner could not be again tried. On the last occasion the cases in the supreme courts of Massachusetts, New York, and Pennsylvania were cited; and the court adopted that of the supreme court of Pennsylvania, and affirmed the exposition of the clause given by that court, that no man shall be twice put in jeopardy, &c., for the same offence. In a still later case in the same state, it was held that a jury, charged in a capital case, cannot be discharged before returning the verdict at the discretion of the court; they cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial which was beyond human foresight and control; and, generally speaking, such necessity must be set forth in the record.<sup>1</sup>

§ 871. *Tennessee*. — In Tennessee, on the first examination of the subject, it appears to have been held, Peck, J., dissenting, that it was discretionary in the court even in capital cases to discharge the jury;<sup>2</sup> but that opinion was subsequently reviewed in a case of great deliberation. In the latter case,<sup>3</sup> the jury were empanelled on Thursday afternoon, at two o'clock; they came in once or twice during the same evening, and declared that they could not agree; they were, however, kept together all night by the court, and at nine o'clock the next morning, upon their declaring they could not agree, the court discharged them. The term was not concluded until the next day (Saturday). It was held, that this was not such a case of necessity as authorized the court to discharge them. It was out of the power of the court, it was said, to discharge them without consent, *except in case of sickness, insanity, or exhaustion among themselves*.

§ 872. *Alabama*. — In Alabama, after a careful review of the subject, the following points were made: 1st. That courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given; 2d. That a jury is, *ipso facto*, discharged by the determination of the authority of the court to which it is attached; 3d. That a court does possess the power to discharge in

<sup>1</sup> State v. Ephraim, 2 Dev. & Bat. 162. See also State v. Prince, 63 N. C. 528; State v. Alman, 54 N. C. 364.

<sup>2</sup> State v. Waterhouse, 1 Mart. & Yerger, 278.

<sup>3</sup> Mahala v. State, 10 Yerger, 532. See State v. Rankin, 4 Cold. (Tenn.) 145.



any case of pressing necessity, and should exercise it whenever such a case is made to appear; 4th. That sudden illness of a prisoner or a juror, so that the trial cannot proceed, are ascertained cases of necessity, and that many others exist which can only be defined when particular cases arise; 5th. That a court does not possess the power, in a capital case, to discharge a jury because it cannot or will not agree; <sup>1</sup> 6th. That therefore the unwarrantable discharge of a jury, after the evidence is closed in a capital case, is equivalent to an acquittal.<sup>2</sup> In the same state, where, after a trial is commenced, the judge withdraws and the trial is completed by another judge, and the judgment is reversed for that cause, the prisoner cannot be said to have been in jeopardy, and he may be tried again; and this although the judgment of reversal does not award a *venire de novo*.<sup>3</sup>

§ 873. *California.* — In California it is held that a discharge, without the prisoner's consent, unless from a legal necessity, or from cause beyond the control of the court, such as death, sickness, or insanity of some one of the jury, of the prisoner, or of the court, protects the defendant from a re-trial.<sup>4</sup>

§ 874. *Where the separation of the jury, when it takes place in the exercise of a sound discretion, is no bar to a second trial.* — This is substantially the view of the supreme court of the United States, of Washington, J., Story, J., and McLean, J., sitting in their several circuits; and of the courts of Massachusetts, New York, Iowa, Maryland, Ohio, Indiana, Georgia, Nebraska, Missouri, Illinois, Kentucky, Texas, and Mississippi.

§ 875. *Federal courts.* — In the supreme court of the United States, the subject was brought up in 1824, upon a certificate of division in the opinions of the judges of the circuit court for the Southern District of New York. The jury were discharged in the court below on account of mere disagreement. "The question arises," was the language of the court, "whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be

<sup>1</sup> *Ned v. State*, 7 Porter, 188.

<sup>2</sup> *State v. Abram*, 4 Ala. 272.

<sup>3</sup> *Ibid.* 187. See Wh. C. L. 7th

<sup>4</sup> *People v. Webb*, 38 Cal. 467.

*Id.* § 3168, 3305.

had. We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put on trial.”<sup>1</sup>

The same view is defended by Judge Washington,<sup>2</sup> by Judge Story,<sup>3</sup> and by Judge McLean.<sup>4</sup>

It has been held in the United States circuit court for New York, that a man is not put in jeopardy by the empanelling and swearing of a jury by inadvertence, when it was dismissed before he is arraigned.<sup>5</sup>

§ 876. *Massachusetts.* — In Massachusetts, the practice, from an early period, was to discharge juries at the discretion of the court, in cases both capital and otherwise.<sup>6</sup> But in 1823 a case came up where a jury, in a capital case, having been out eighteen hours, were discharged on account of inability to agree. The

<sup>1</sup> U. S. v. Perez, 9 Wheaton, 579.

<sup>4</sup> U. S. v. Shoemaker, 2 McLean,

<sup>2</sup> U. S. v. Haskell, 4 Wash. C. C. 114.

409.

<sup>5</sup> U. S. v. Riley, 5 Blatch. C. C. 204.

<sup>6</sup> U. S. v. Gibert, 2 Sumner, 19; U. S. v. Coolidge, 2 Gall. 364.

<sup>6</sup> Com. v. Bowden, 9 Mass. 494. See Com. v. Sholes, 13 Allen, 554.

defendant was tried again, and convicted of manslaughter, and the point was argued on arrest of judgment. Parker, C. J., in delivering the opinion of the court, after maintaining that there was no jeopardy till verdict, held that the discharge did not preclude a second trial.<sup>1</sup>

§ 877. *New York.* — In New York, the point arose and was elaborately argued on an indictment for manslaughter, where the jury, after the whole cause was heard, being unable to agree, were discharged by the court without the consent of the prisoner. The question was whether, under these circumstances, the defendant could again be put on his trial. On the part of the defendant it was contended that he could not, among other reasons, because the Constitution of the United States had declared, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;” and that putting the party upon trial was putting him in jeopardy of life and limb. The argument on the other side was, that this clause did not apply to state courts; and, if it did, it was inapplicable to the cause, for if the cause was sent to another jury, the defendant would not be twice in jeopardy, nor twice tried, for there never had been a trial in which the merits had been decided on. The court inclined to the opinion that the clause was operative upon the state courts; but, at all events, that it was a sound and fundamental principle of the common law; that the true meaning of the clause was that no man shall be twice tried for the same offence; that the true test by which to decide the point whether tried or not, is by the plea of *autrefois acquit* or *autrefois convict*; and, finally, that a “defendant is not once put in jeopardy until the verdict is rendered for or against him, and if for or against him, he can never be drawn in question again for the same offence.” And the court accordingly held, that the discharge of the jury before giving a verdict was no bar to another trial of the defendant.<sup>2</sup>

In 1862, however, in the court of errors, it was held, that when the defendant had been once put in jeopardy, and convicted, and the judgment reversed, *for an error in the sentence*, the other proceedings being regular, he could not afterwards be

<sup>1</sup> *Com. v. Purchase*, 2 Pick. 521. 187. See also *People v. Olcott*, 2 John.

<sup>2</sup> *People v. Goodwin*, 18 John. R. Cas. 301.

tried.<sup>1</sup> And in 1863, in the same court, the same rule was applied to a case of murder, and in aid of the rule the constitutional provision was expressly invoked.<sup>2</sup> But as a general rule under 2 Rev. Stat. 1586, § 24, a discharge of the jury without rendering a verdict is no bar to a second trial.<sup>3</sup>

Where the jury, after the cause was committed to them, and before they had rendered or agreed upon a verdict, had separated without having been legally discharged, it was held in 1871 that, as any verdict in the case, to be afterwards rendered by that jury, would doubtless have been invalid and set aside, there was a necessity for the exercise of the power of the court, in its discretion, and in furtherance of justice, to discharge the jury. And that, such power having been exercised by a competent court, the discharge constituted no bar to a new trial of the prisoner.<sup>4</sup>

§ 878. *Maryland*.—In Maryland, in 1862, the view of the supreme court of the United States was expressly adopted.<sup>5</sup>

§ 879. *Mississippi*.—In Mississippi, after a cursory review of the authorities, the same result was reached.<sup>6</sup> In 1860, it was held, that though a discharge, because the jury were “unable to agree on a verdict,” worked an acquittal, yet it is otherwise when the term of the court is about to expire, and there is no possibility of agreement.<sup>7</sup>

§ 880. *Illinois*.—In Illinois, the same view was taken, and in this state the rule laid down by the federal courts must be considered as obtaining.<sup>8</sup>

§ 881. *Ohio*.—In Ohio, in 1863, it was determined that when the jury had been long enough together “to leave very little doubt that their opinions must have been inflexibly formed,” and were unable to agree, the court, at its discretion, could discharge.<sup>9</sup> And now, by the Code of Criminal Procedure, this is established by statute.

<sup>1</sup> *Shepherd v. People*, 11 E. P. Smith, 407.

<sup>2</sup> *People v. Hartung*, 12 E. P. Smith, 167.

<sup>3</sup> *Canter v. People*, 38 How. Pr. 91 (1867).

<sup>4</sup> *People v. Reagle*, 6 Barbour, 527 (1871). See also *S. P. McKenzie v. State*, 26 Ark. 334.

<sup>5</sup> *Hoffman v. State*, 20 Maryland, 425.

<sup>6</sup> *Moore v. State*, 1 Walker, 134; *Price v. State*, 36 Missis. 533.

<sup>7</sup> *Josephine v. State*, 39 Missis. 613; *Woods v. State*, 43 Miss. 364.

<sup>8</sup> *State v. Stone*, 2 Scam. 326.

<sup>9</sup> *Dobbins v. State*, 14 Ohio St. R. 493.

§ 882. *Indiana*. — The same view is now adopted in Indiana, though after some vacillation in the earlier cases.<sup>1</sup> But it is held that there should be no discharge as long as the court thinks agreement possible; and a discharge without good cause shown on record operates as an acquittal.<sup>2</sup>

The fact that the bailiff, in a murder case, took the jury to a public square and left them there, and then got a can of beer from the defendant's shop, the defendant being out on bail, of which beer the jury drank, was held in itself not sufficient ground for the discharge of the jury.<sup>3</sup>

A defendant not excepting to the irregular discharge of a juror, *after* swearing, but before case opened, is deemed to consent to the discharge, and cannot after conviction except.<sup>4</sup>

§ 883. In *Iowa*,<sup>5</sup> and in *Texas*,<sup>6</sup> the right of the court to discharge at their discretion (provided reasonable ground be laid) is asserted.

§ 884. *Kentucky*. — In Kentucky, the question was discussed in 1824, in a case not involving life or limb, but which served to bring up incidentally the interpretation to be given to the word "jeopardy," as it exists both in the Constitution of the United States and of Kentucky.<sup>7</sup>

§ 885. *Georgia*. *Nebraska*. — A discharge, in Georgia, on account of disability to agree, does not work an acquittal.<sup>8</sup> The same view is expressed in Nebraska.<sup>9</sup>

§ 886. *Missouri*. — In Missouri, the constitution provides that "if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of such court."<sup>10</sup>

The same general position is taken by Judge Story, in his Treatise on the Constitution,<sup>11</sup> and by Judge Tucker, in his notes to Blackstone.<sup>12</sup>

§ 887. *In either view, it is agreed that there is no jeopardy on*

<sup>1</sup> *State v. Nelson*, 26 Ind. 366;

*Shaffer v. State*, 27 Ind. 131.

<sup>2</sup> *State v. Walker*, 26 Ind. 346; *O'Brien v. Com.* 6 Bush, 563.

*Shaffer v. State*, 27 Ind. 131.

<sup>3</sup> *State v. Leunig*, 42 Ind. 541.

<sup>4</sup> *Kingen v. State*, 46 Ind. 132.

<sup>5</sup> *State v. Redman*, 17 Iowa, 329;

*State v. Vaughan*, 29 Iowa, 286.

<sup>6</sup> *Moseley v. State*, 33 Texas, 671.

<sup>7</sup> *Com. v. Olds*, 5 Little, 140;

<sup>8</sup> *Lester v. State*, 33 Ga. 329.

<sup>9</sup> *Card v. People*, 3 Neb. 357.

<sup>10</sup> Const. Missouri, art. 11, s. 10.

<sup>11</sup> 3 Story on the Const. 660.

<sup>12</sup> 1 Tuck. Black. App. 305.

*defective indictment.* — Where, however, the indictment has been defective, even in a capital case, it is agreed on all sides the defendant has never been in jeopardy, and consequently, if judgment be arrested, a new indictment can be preferred, and a new trial instituted, without violation of the constitutional limitation. It is equally conceded that a verdict of acquittal or conviction upon a good indictment, in cases affecting life or limb, will be a bar to a subsequent prosecution for the same offence, although no judgment was ever entered upon such verdict.<sup>2</sup> But a judgment for the prosecution, on a plea in abatement to a former indictment for the same offence, is not necessarily a bar.<sup>3</sup>

On the same principle, a defendant is not in jeopardy who has had leave to withdraw a plea in law, and to plead in abatement, which plea is found for him ; and he may be indicted a second time in his true name.<sup>4</sup>

§ 888. *Generally, illness or death of juror forms sufficient ground for discharge.* — It is submitted, in conclusion, that the two classes of opinions which have been the subject of discussion may be reconciled, should it be conceded that the “discretion,” in exercise of which a court, when intrusted with it, is justified in discharging a prisoner, must be a “legal necessity,” such as would, if spread on the record, enable a court of error to say that the discharge was correct. The cases are clear that the term “legal necessity” is not confined to cases such as death, &c., when the discharge becomes inevitable. Thus it is held on all sides that if a juror die during the trial, or be taken so ill as to be unable to attend to the evidence or agree in the verdict, the survivors must be discharged, and the prisoner tried afresh ; and even in those states where the law of “once in jeopardy” is most stringent, “serious illness” is enough.<sup>5</sup> The escape of a

<sup>1</sup> Gerard v. People, 3 Scam. 363 ; 206 ; Kohlheimer v. State, 39 Mis. Com. v. Cook, 6 Serg. & Rawle, 577 ; 548. See Whart. Cr. L. 7th ed. § Com. v. Clue, 3 Rawle, 498 ; State v. 3168, 3305.

Garrigues, 1 Hayw. 241 ; Com. v. Purchase, 2 Pick. 521 ; State v. Woodruff, 2 Day, 504 ; State v. Ray, 1 Rice, 1 ; People v. Barrett, 1 Johns. 66 ; Com. v. Loud, 3 Metc. 328 ; Com. v. Keith, 8 Metc. 531 ; People v. March, 6 Cal. 543 ; Pritchett v. State, 2 Sneed (Tenn.), 285 ; People v. McNealy, 17

<sup>2</sup> State v. Norvell, 2 Yerger, 24 ; State v. Spear, 6 Mo. 644. See Wh. Cr. L. 7th ed. § 540.

<sup>3</sup> Gardiner v. People, 6 Parker C. R. 155.

<sup>4</sup> Com. v. Farrell, 105 Mass. 189. See Com. v. Sholes, 13 Allen, 554.

<sup>5</sup> Com. v. Fells, 9 Leigh, 613 ; Mahala v. State, 10 Yerger, 532 ; State v.

juror;<sup>1</sup> sickness of the judge,<sup>2</sup> and the closing of the term of the court,<sup>3</sup> have been said to have the same effect.<sup>4</sup> A sick juror may be attended by another juror, or a surgeon, accompanied by a bailiff, sworn to remain constantly with him. The juror or surgeon, on his return, may be questioned on oath, to make true answer to such questions as the court shall demand of him respecting the state of the absent juror. If it appear that he will in all probability speedily recover, he may have refreshment;<sup>5</sup> but if not, or if he die, the eleven jurors must be discharged from giving any verdict.

§ 889. *Mistake of law by judge.*—A conviction, set aside on account of erroneous ruling by the judge, is no bar to a second trial. The defendant, by setting up the position that the ruling was erroneous, is afterwards estopped from disputing this. He affirms that he never was in legal jeopardy, and that the ruling of the judge against him putting him in jeopardy was not law. When he has gained his point he cannot afterwards plead jeopardy.<sup>6</sup>

§ 890. *Sickness of prisoner.*—This has been sometimes held a sufficient ground, on the prisoner's request, to discharge a jury; and this consent may, it seems, be implied from sudden incapacitating illness. In such case, the first trial is no bar to the second.<sup>7</sup>

§ 891. *Statutory close of term of court.*—Except in North

Curtis, 5 Humph. 601. See *Hector v. State*, 2 Mo. 166; *U. S. v. Haskell*, 4 Wash. C. C. 402; *Fletcher v. State*, 6 Humph. 249; *People v. Webb*, 38 Cal. 467; *R. v. Scalbert*, 2 Leach, 620; *R. v. Barrett*, Jebb, 106; *R. v. Leary*, 3 Crawford & Dix, 212. Wh. C. L. 7th ed. § 3168, 3305, 3331.

<sup>1</sup> *State v. Hall*, 4 Halst. 256; *State v. McKee*, 1 Bailey, 651; *Hanscom's case*, 2 Hale P. C. 295.

<sup>2</sup> *Nugent v. State*, 4 Stew. & Port. 72.

<sup>3</sup> *State v. McLemore*, 2 Hill S. C. 680; *State v. Battle*, 7 Ala. 259; *Ned*

*v. State*, 7 Port. 187; *Wright v. State*, 5 Ind. 290; though see *Spier's case*, 1 Dev. 491.

<sup>4</sup> *Powell v. State*, 19 Alab. 577.

<sup>5</sup> *Com. v. Clue*, 3 Rawle, 498; *Rulo v. State*, 19 Ind. 298.

<sup>6</sup> Wh. C. L. 7th ed. § 751 a, 3248.

<sup>7</sup> *R. v. Stevenson*, 2 Leach, 546; *R. v. Streek*, 2 C. & P. 413; *R. v. Kell*, 1 Craw. & Dix, 151; *People v. Goodwin*, 18 Johns. 187; *State v. McKee*, 1 Bailey, 651. See also *Sperry v. Com.* 9 Leigh, 623. See Wh. C. L. 7th ed. § 3168, 3305.

Carolina<sup>1</sup> this has been held to justify a discharge, which is no bar to a second trial.<sup>2</sup>

§ 892. *Sickness or death of judge.* — Sickness of the judge, requiring discharge of the jury, is a "necessity."<sup>3</sup> And *a fortiori* is this the case as to the death of a judge during a trial before a jury.<sup>4</sup>

§ 893. *Sickness or incapacity of witness.* — In Ireland this has been held not to constitute ground to discharge the jury, even though the witness was essential to the prosecution; and when a discharge was made in such case, it was held that the prisoner could not be tried again.<sup>5</sup> Such sickness has been held in America ground for *postponing* a trial, but not, unless corruption be shown, for *discharging* a jury.<sup>6</sup>

Whether the court will adjourn a trial on account of the incapacity of a witness is discussed in another treatise.<sup>7</sup>

§ 894. *Until jury are "charged" jeopardy does not begin.* — However conflicting the cases may be as to what legal necessity justifies a discharge, they unite in the position that until the jury are "charged" with the offence, the jeopardy does not begin. Until they are sworn it is not necessary that they should be kept together as "empanelled." The general court of Virginia, which adopts, as has been seen, the extreme view of the "once in jeopardy" guarantee, has held that until the oath was administered the jury were not in the custody of the sheriff, because they were not "charged;"<sup>8</sup> and the Tennessee supreme court, also holding the same view, has sustained a conviction where *after* a jurymen was selected, but *before* he was sworn he was withdrawn by the

<sup>1</sup> Spier's case, 1 Devereux, 491; though see, as overruling this, State v. Tillotson, 7 Jones, 114.

<sup>2</sup> R. v. Newton, 12 Q. B. 716; 3 Cox C. C. 489; State v. McLemore, 2 Hill S. C. 680; State v. Battle, 7 Alabama, 259; People v. Thompson, 2 Wheeler C. C. 473; State v. Moor, 1 Walker (Miss.), 134; Mahala v. State, 10 Yerger, 532; State v. Brooks, 3 Humphreys, 70; Himes v. State, 8 Humphreys, 597; Ned v. State, 7 Porter, 187; Wright v. State, 5 Ind. 290.

<sup>3</sup> Nugent v. State, 4 Stew. & Port. 72.

<sup>4</sup> People v. Webb, 38 Cal. 467; Bescher v. State, 32 Ill. 480; Wh. C. L. 7th ed. § 3392, 3411.

<sup>5</sup> R. v. Kell, 1 Crawford & Dix, 151. See R. v. Wade, 1 Mood. C. C. 86; R. v. Oulaghan, Jebb's C. C. 370.

<sup>6</sup> U. S. v. Coolidge, 2 Gallison, 364; Com. v. Wade, 17 Pick. 397. See Wh. C. L. 7th ed. § 3168, 3308.

<sup>7</sup> Wh. C. L. 7th ed. § 3168, 3305.

<sup>8</sup> Epes's case, 5 Grattan, 676. Wh. C. L. 7th ed. § 3305.



court, because found to be a minor;<sup>1</sup> and in Illinois it was held correct, in a capital case, as has just been observed, to strike off a juryman *after* the jury were sworn, on the ground that he was an alien.<sup>2</sup> So also it has been held in Pennsylvania,<sup>3</sup> where the court, after the jury had been sworn, struck off a juryman on the ground that he was incompetent from irreligion and prejudice. *A fortiori*, therefore, neither a *nolle prosequi*, when entered before empanelling a jury,<sup>4</sup> nor an ignoring by a grand jury,<sup>5</sup> nor a discharge on *habeas corpus*,<sup>6</sup> has the effect of relieving the defendant from further prosecution.

§ 895. *Consent of prisoner to discharge.* — The more general opinion is that the prisoner may waive his constitutional privilege by a consent to the discharge of the jury,<sup>7</sup> or to their separation,<sup>8</sup> by a motion in arrest or vacation of judgment,<sup>9</sup> or by a motion for a new trial.<sup>10</sup> But that such consent can be made operative in a capital case has been denied in Pennsylvania,<sup>11</sup> Tennessee,<sup>12</sup> Louisiana,<sup>13</sup> Mississippi,<sup>14</sup> and California.<sup>15</sup>

Even in England, consent in capital cases does not cure an irregular discharge.<sup>16</sup>

<sup>1</sup> *Hines v. State*, 8 Humph. 597.

<sup>2</sup> *Stone v. State*, 2 Scam. 326.

<sup>3</sup> *Com. v. McFadden*, 11 Harris, 12.

<sup>4</sup> Wh. C. L. 7th ed. § 544. See *Com. v. Dunham*, Thach. C. C. 513; *Brown v. State*, 5 Eng. 607; *Com. v. Drew*, 3 Cush. 279; *Com. v. Thompson*, 3 Litt. 284.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> See *Stewart v. State*, 15 Ohio St. R. 161; *R. v. Deane*, 5 Cox C. C. 501; *People v. Webb*, 38 Cal. 467; *Kingen v. State*, 46 Ind. 132; but see *State v. Tuller*, 34 Conn. 280; Wh. C. L. 7th ed. § 3175.

<sup>8</sup> *Dye v. Com.* 7 Gratt. 662; *Williams v. Com.* 2 Gratt. 567; *Elijah v. State*, 1 Humph. 102; *R. v. Stokes*, 6 C. & P. 151; Wh. C. L. 7th ed. § 3305.

<sup>9</sup> *State v. Arrington*, 3 Murph. 571;

*Com. v. Fischblatt*, 4 Metc. 354; *Page v. Com.* 9 Leigh, 683.

<sup>10</sup> *U. S. v. Perez*, 9 Wheaton, 579; *Com. v. Clue*, 3 Rawle, 500; *Com. v. Brown*, 3 Rawle, 207; *Com. v. Murray*, 2 Ashmead, 41; *State v. Greenwood*, 1 Hayw. 141; *State v. Jeffreys*, 3 Murphey, 480; *State v. Lipsey*, 3 Dev. 485; *State v. Sims*, 2 Bailey, 29; *Ball's case*, 8 Leigh, 726. See Wh. C. L. 7th ed. § 3175, 3305, &c.

<sup>11</sup> *Pieffer v. Com.* 3 Harris, 469. See Wh. C. L. 7th ed. § 3302-5.

<sup>12</sup> *Wesley v. State*, 11 Humph. 502; *Wiley v. State*, 1 Swan, 256.

<sup>13</sup> *State v. Populus*, 12 La. Ann. 710.

<sup>14</sup> *Woods v. State*, 43 Missis. 364.

<sup>15</sup> *People v. Backus*, 5 Cal. 275; but see Wh. C. L. 7th ed. § 3309.

<sup>16</sup> *R. v. Perkins*, Holt, 403. See *R. v. Kell*, 1 Crawf. & Dix, 151; Whart. C. L. § 3175.

## CHAPTER XXIV.

### VERDICT.

Conviction or acquittal of manslaughter acquits of murder, § 898.	In excusable homicide verdict is not guilty, § 902.
Jury may convict of minor degree, § 899.	May be accessory to murder in second degree, § 903.
Verdict must specify degree, § 900.	Variance in verdict, § 904.
At common law can be no conviction of assault on indictment for murder, § 901.	General verdict, § 905.
	Verdict on inconsistent counts, § 906.

§ 898. *Conviction or acquittal of manslaughter acquits of murder.* — Where the jury convicts of manslaughter (or of murder in the second degree), the verdict, in order to be technically correct, should be, “not guilty of murder, but guilty of manslaughter (or of murder in the second degree).” In Maryland this exactness is held to be essential.<sup>1</sup> But in most jurisdictions such nicety is not required.<sup>2</sup> And where the indictment includes murder, and is in itself valid, either a conviction or acquittal of manslaughter, as has just been seen,<sup>3</sup> is an acquittal of murder. The same effect attends a conviction or acquittal of murder in the second degree, on an indictment for murder at common law.<sup>4</sup>

§ 899. *Jury may convict of minor degree.* — On an indictment for murder the jury may find a verdict of manslaughter or of murder in the second degree,<sup>5</sup> but not, in the Pennsylvania practice, of the misdemeanor of involuntary manslaughter.<sup>6</sup> So also on an indictment for murder in the second degree there can be a conviction of manslaughter. Different defendants may be convicted of different degrees.<sup>7</sup>

<sup>1</sup> *State v. Flannigan*, 6 Md. 166; *Nevins v. People*, 61 Barb. 307; *Weighurst v. State*, 7 Md. 445. *Keefe v. People*, 49 N. Y. 348; 7

<sup>2</sup> See Wh. C. L. 7th ed. § 561, 562, *Abbott Pr. Ca.* N. S. 76; *State v. Huber*, 8 Kans. 447.

<sup>3</sup> See *supra*, § 861.

<sup>4</sup> *Ibid.* Wh. C. L. 7th ed. § 550; *Walters v. Com.* 8 Wright, 135.

*State v. Lessing*, 16 Minnes. 80, 187. <sup>7</sup> Whart. Cr. L. 7th ed. § 3199;

<sup>5</sup> Wh. C. L. 7th ed. 400, 627; *McMickey v. Com.* 9 Bush, 593.

§ 900. *Verdict must specify degree.* — In New York, on an indictment for murder at common law, a verdict of guilty, without specifying the degree, is a verdict of guilty of murder in the first degree.<sup>1</sup> But as a general rule, established in many states by statute (*e. g.* Maine, Pennsylvania,<sup>2</sup> Ohio, and California), in others, as a common law principle, the degree must be designated.<sup>3</sup> In Missouri it is only necessary, by statute, to specify the degree when a minor offence is found.<sup>4</sup> In Georgia, a verdict of "guilty of manslaughter" is regarded as a verdict of guilty of voluntary manslaughter, the highest grade of that offence by statute.<sup>5</sup>

§ 901. *At common law no conviction of assault on indictment for murder.* — As a general rule, at common law, there can be no conviction for an assault under an indictment for murder. In what respect this rule has been varied by statute or otherwise, has been discussed elsewhere.<sup>6</sup>

§ 902. *In excusable homicide verdict is not guilty.* — Where the jury find the homicide is excusable, the practice in this country is not to find so specially, but to acquit.<sup>7</sup>

§ 903. *May be accessory to murder in second degree.* — A person may be legally convicted as accessory before the fact of murder in the second degree.<sup>8</sup>

§ 904. *Variance.* — When a verdict is found against a defendant of "guilty of murder as principal in the second degree," when he is indicted as the absolute actor and perpetrator of the

<sup>1</sup> Kennedy v. People, 39 N. Y. 245.

<sup>2</sup> The prior inclination of the courts had been to hold that, on an indictment for murder, a general verdict of guilty was a verdict of guilty of murder in the first degree. *Com. v. Earle*, 1 Whart. R. 525; *Johnson v. Com.* 24 Penn. St. 386.

<sup>3</sup> *Supra*, § 197; *Johnson v. State*, 17 Alab. 618; *Kennedy v. State*, 6 Indiana, 485; *State v. Town, Wright*, 75; *Dick v. State*, 3 Ohio St. 88; *Parks v. State*, *Ibid.* 101; *McGee v. State*, 8 Mo. 495; *State v. Upton*, 20 Mo. 397; *Ford v. State*, 12 Md. 514; *State v. Moran*, 7 Clarke (Iowa), 236; *Tulley v. People*, 6 Mich. (2 Cooley)

273; *State v. Reddick*, 7 Kansas, 143; *State v. Huber*, 8 Kansas, 447 (by statute); *State v. Redman*, 17 Iowa, 329; *Hall v. State*, 40 Ala. 698; *Robertson v. State*, 42 Ala. 509 (by statute); *Hogan v. State*, 30 Wisc. 437; *Isbell v. State*, 31 Tex. 138; *State v. Verrill*, 54 Me. 408; *State v. Cleveland*, 58 Me. 564; *State v. Dowd*, 19 Conn. 388; *People v. Campbell*, 40 Cal. 129.

<sup>4</sup> *State v. Brannon*, 45 Mo. 329.

<sup>5</sup> *Welch v. State*, 50 Ga. 128.

<sup>6</sup> Wh. C. L. § 400, 627, 3183.

<sup>7</sup> See *supra*, § 10.

<sup>8</sup> *Jones v. State*, 13 Tex. 168.

crime, the verdict is erroneous under the Georgia statute.<sup>1</sup> But it is otherwise at common law.<sup>2</sup>

§ 905. *General verdict.* — A verdict in the following words: "We, the jury, find, from the evidence produced, that the prisoner is guilty of the murder of B.," is a general verdict.<sup>3</sup>

§ 906. *Verdict on inconsistent counts.* — That a general verdict of guilty should be taken when there is a variety of counts, stating the mode of death in different ways, is no error.<sup>4</sup>

<sup>1</sup> *Washington v. State*, 36 Georg. 222 (Warner, C. J. 1867).

<sup>2</sup> *McGuffie v. State*, 17 Georg. 493.

<sup>3</sup> *Supra*, § 841.

<sup>4</sup> *State v. Baker*, 63 N. C. 276; *supra*, § 819.

## APPENDIX.

### No. I.

#### SELFRIDGE'S CASE.

*Supreme Court of Massachusetts, 1806.*

IN this case, which has been discussed at large in the preceding pages (see § 213 a, 509, 628), the charge to the jury by Parker, J., was as follows:—

GENTLEMEN OF THE JURY: As this most interesting trial has already occupied four days, and as you must by this time be nearly exhausted, I shall endeavor, in discharging the duty incumbent on me, to consume as little more of your time as may be consistent with a clear exposition of the principles necessary to be understood, in order to form a just and legal decision. You have heard the important facts in the case minutely and distinctly stated by the witnesses, ably and ingeniously commented upon by counsel, and the principles of law elaborately discussed and illustrated in as forcible and eloquent arguments as were ever witnessed in any court of justice in our country. It is now left to you upon the whole view of the case, both of the law as it shall be declared to you by the court, and the facts as proved by the testimony, to pronounce a verdict between the defendant and your country. That in so important a trial it should have devolved upon me, alone, to preside over its forms, as well as to declare the principles upon which your decision is to rest, is by no means a subject of congratulation. It is a situation which of all others I should have avoided, had not official duty imperiously imposed it upon me. But the organization of the court and distribution of the services of its members are such as to have rendered any other arrangement difficult, if not impossible. Under our present judiciary establishment, all criminal causes, other than capital, are triable before one judge; and this system has proved itself to be eminently calculated for the dispatch of public business; other provisions in the system insure as great a degree of correctness as can be expected of any human institution. It is true that although at a term holden by one judge, if others are present, they may proceed together; but at this time, the court being in session in three, if not four several counties, it was impracticable, had it been desirable, to

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have more than two judges engaged in the present trial. The great delay which would have taken place, in consequence of a division of opinion (a case not unlikely to happen in the course of any trial) between two judges, rendered it altogether inexpedient that more than one should attend; and as this term had been previously assigned to me, the unpleasant task of officiating in the present case seemed unavoidably to belong to me.

Since it has thus fallen to me to execute a painful and anxious duty, I shall not shrink from the task of declaring to you the principles of law by which you are to be governed in your investigation and decision of this case. If, in doing this, I should be found capable, in order to retain the favor of one class of the community or to court that of another, of abusing my office, by stating that to be law which I know to be otherwise, this is the last time I should be suffered to sit upon this bench, and I ought to meet the execration and contempt of the society to which I belong. The crime charged by the grand jury upon the defendant is manslaughter, — a crime of high consideration in the eye of the law. This crime, however, is not defined by our statute, but its punishment is by it provided for. In order, therefore, to ascertain the nature and character of the crime, it is necessary to resort to the books of the common law, the principles of which, by the constitution of our government, are made the law of our land, until they shall be changed or repealed by our own legislature. The counsel for the government, as well as for the defendant, have therefore wisely and properly searched the most approved authorities of the common law, for the principles upon which the prosecution or the defence must be supported. It is from those books alone that any clear ideas of the offence which is in trial, or the defence which has been set up, can be attained. The crime of manslaughter, according to those authorities, consists in the unlawful and wilful killing of a reasonable being, without malice, express or implied, and without any justification or excuse. That the killing of a human being, under some circumstances, is not only excusable, but justifiable, is proved by the very terms of this definition. Some persons, however, have affected to entertain the visionary notion, that it is in no instance lawful to destroy the life of another, grounding their opinion upon the general proposition in the Mosaic code, that "Whosoever sheddeth man's blood, by man shall his blood be shed." There is always danger in taking general propositions as the rules of faith or action, without attending to these exceptions, which, if not expressly declared, necessarily grow out of the subject matter of the proposition. Were the position above alluded to true, in the extent contended for by some, then the judge who sits in the trial of a capital offence, the jury who may convict, the magistrate who shall order execution, and the sheriff who shall execute, will all fall within this general denunciation, as by their instrumentality the blood of man has been shed. The same

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observations may be applied to one of the precepts in the Decalogue. Thou shalt not kill, is a mandate of God himself. Should this be construed literally and strictly, then a man who, attacked by a robber, or in defence of the chastity of his wife, or of his habitation from the midnight invader, should kill the assailant, would offend against the divine command, and be obnoxious to punishment. But the common understanding of mankind will readily perceive that the very nature of man, and principle of self-preservation, will supply exceptions to these general denunciations.

Our laws, like those of all other civilized countries, abundantly negative such unqualified definitions of crime, and have adopted certain principles by which the same act may be ascertained to be more or less criminal or entirely innocent, according to the motive and intent of the party committing it. Thus when the killing is the effect of particular malice or general depravity, it is murder, and punished with death. When without malice, but caused by sudden passion and heat of blood, it is manslaughter. When in defence of life, it is excusable. When in advancement of public justice, in obedience to the laws of the government, it is justifiable. These principles are all sanctioned by law and morality, and yet they all contradict the dogma, that "Whosoever sheddeth man's blood, by man shall his blood be shed." It is not necessary for you to run a nice distinction between justifiable and excusable homicide; if the one now in trial be either the one or the other, it is sufficient for the purpose of the defendant. A distinction existed in England, which does not exist here; there the man who had committed an excusable homicide forfeited his goods and chattels, while he who had justification forfeited nothing. Here, whether the homicide be justifiable or excusable, there must be an entire acquittal. Numerous authorities, ancient and modern, have been read to you upon this subject. Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrassments, there being in some instances an apparent, though in none a real incongruity. But I apprehend you need not trouble yourselves with the books out of court, for I think I shall be able to state all the principles you will have occasion to consider; there being in fact no disagreement about them from the time of Sir Edward Coke, one of the earliest sages of the law, down to Sir William Blackstone, one of its brightest ornaments. These same principles, although taken from English books, have been immemorially discussed, and practised upon by our lawyers, adopted and enforced by our courts and juries, and recognized by our legislature. To prove this, I now need say no more, than that the same learned Judge Trowbridge, who was quoted by the attorney general, in his charge to the jury in the trial of the soldiers for the massacre in 1770, laid down,

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discussed, and illustrated with great precision and clearness every principle which can come in question in the present trial. These principles I will endeavor to simplify for your consideration.

*First.* A man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life, or prevent the intended harm, — such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.

*Secondly.* When the attack upon him is so sudden, fierce, and violent that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

*Thirdly.* When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Of these three propositions, the last is the only one which will be contested anywhere; and this will not be doubted by any one who is conversant in the principles of criminal law. Indeed, if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case: A. in the peaceable pursuit of his affairs sees B. rushing rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough, in the same attitude, A. who has a club in his hand strikes B. over the head before, or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with *powder only*, and that the real design of B. was only to *terrify* A. Will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol is loaded, — a doctrine which would entirely take away the essential right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle. These are the principles of law, gentlemen, to which I call your attention. Having done this, I might leave the cause with you, were it not necessary to take a brief view of some other parts of it. As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold the privilege of the jury to ascertain the facts, and that of the



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court to declare the law, to be distinct and independent. Should I interfere, with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge into that of an advocate. All which I conceive necessary or proper for me to do, in this part of the cause, is to call your attention to the points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and the law can be clearly discriminated, I should always wish the jury not to leave the stand without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the case. An important rule in the present trial is, that on a charge for murder or manslaughter, the killing being confessed or proved, the law presumes that the crime, as charged in the indictment, has been committed, unless it should appear by the evidence for the prosecutor, or be shown by the defendant on trial, that the killing was under such circumstances as entitle him to justification or excuse. On the point of killing, there is no doubt in this case. The young man named in the indictment unquestionably came to his death by means of the discharge of a pistol by the defendant at the bar. This part is confessed as well as proved. The great question in the case is whether, according to the facts shown to you on the part of the prosecution, or by the defendant, any reasonable, legal justification or excuse has been proved. Whether the killing were malicious or not is no farther a subject of inquiry than that if you have evidence of malice, although this crime charged does not imply malice, it may be considered as proving this crime, because it effectually disproves the only defence which can be set up after a killing is established.

From the testimony of several witnesses examined by the solicitor and attorney generals, it appears that on the day set forth in the indictment the defendant was in his office a little before one o'clock; that in a conversation about his quarrel with the father of the deceased, he intimated that he had been informed an attack upon him was intended, and that he was prepared. That a short time afterwards, he went down from his office, which is in the Old State House, crossing State Street diagonally, tending towards the United States Bank. That as he passed down his hands were behind him, outside of his coat, without anything in them, is proved by the testimony of Mr. Brooks, who saw him pass down, and by that of young Mr. Erving, who saw him when the deceased

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approached, put his right hand in his pocket, and take out his pistol, while his left arm was raised to protect his head from an impending blow. The manner of his going down upon 'Change, the weapon which he had with him, the previous intimation of an attack which he seems to have received, from Mr. Cabot or Mr. Welch, and the errand upon which he went down, as stated by Mr. Ingraham, are all circumstances worthy of your deliberate attention. Passing down State Street, as before described, several witnesses testify that the deceased, who was standing with a cane in his hand near the corner of the Suffolk Buildings, having cast his eye upon the defendant, shifted his cane into his right hand, stepped quick from the sidewalk on to the pavement, advanced upon the defendant, with his arm uplifted; that the defendant turned, stepped one foot back, and that a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterwards given and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who, becoming exhausted, fell down, and in a few minutes expired. This is the general course of the testimony; the scene was a shocking one, and all the witnesses state to you that they were exceedingly agitated. This will account for the relation given by Mr. Lane and one other witness, I believe Mr. Howe, who state the facts so differently from all the other witnesses produced by government as well as by defendant, that however honest we may think them, it is impossible not to suppose they are mistaken. Indeed, the attorney general has wisely and candidly laid their testimony, so far as it differs from that of the other witnesses, out of the case. There is one witness, Mr. Glover, who states the transactions somewhat differently from the other witnesses. He says, that having expected to see a quarrel upon Exchange, in consequence of the publication against the deceased's father, in the morning, he went there for the express purpose of seeing what should pass: that he saw Mr. Selfridge coming down street, saw young Austin advance upon him; that he had a full view of both parties, was within fifteen feet of them; that he saw a blow fall upon the head of Selfridge with violence, the arm of the deceased raised to give a second blow, which fell the instant the pistol was discharged. This is the only witness who swears to a blow before the discharge of the pistol; but he swears positively, and says he has a clear, distinct recollection of the fact; his character is left without impeachment. If you consider it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances proved by other witnesses, which may corroborate or weaken the testimony of Mr. Glover. On this point you will attend to the testimony of Mr. Wiggin, who swears that he heard a blow as if

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on the clothes of some person ; that he turned, and saw the deceased's arm uplifted, and another blow and the discharge of the pistol were together. You will consider the testimony of young Erving, who swears that the left arm of the defendant was over his forehead, as though defending himself from blows, when he saw the blow fall. You will consider that all the witnesses but Glover state that the blow which they saw, and thought the first, was a long blow across the head ; that the blow which Glover says was the first, was a direct perpendicular blow, and that he then saw the second blow, which was a cross one, as testified by the other witnesses. If you find a difficulty in settling the fact of the priority of the blow, take this for your rule : that a witness who swears positively to the existence of a fact, if of good character and sufficient intelligence, may be believed, although twenty witnesses, of equally good character, swear that they were present and did not see the same fact. The confusion and horror of the scene was such, that it was easy for the best and most intelligent of men to be mistaken as to the order of blows, which followed each other in such rapid succession that the eye could scarcely discern an interval. You will, therefore, compare the testimony of the witnesses, where it appears to vary, attending to their different situation, power of seeing, and capacity of recollecting and relating, and settle this fact according to your best judgment, never believing a witness who swears positively to be perjured, unless you are irresistibly driven to such a conclusion. Upon this point you will also attend to the testimony of Mr. Fales and of Mr. Osborne, and Mr. Perkins Nichols touching the testimony of Mr. Fales. The counsel for the defendant seem, however, to deem it of little importance to ascertain whether the blow was given before the pistol was discharged or not, as there is evidence from all the witnesses that an *assault*, at least, was made by the deceased, before the pistol was fired. I think differently from them upon this point. When the defence is, that the assault was so violent and fierce that the defendant could not retreat, but was obliged to kill the deceased to save himself, it surely is of importance to ascertain whether the violent blow he received on his forehead, which at the same time that it would put him off his guard, would satisfy him of the design of the assailant, was struck before he fired or not. I doubt whether self-defence could in any case be set up, where the killing happened in consequence of an assault only, unless the assault be made with a weapon which, if used at all, would probably produce death. When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defence. But whether the firing of the pistol was before or after a blow struck by the

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deceased, there is another point of more importance for you to settle, and about which you must make up your minds, from all the circumstances proved in the case; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigor of the defendant, and his power to resist or to fly. The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the real stress of the case. If you believe, under all the circumstances, the defendant could have escaped his adversary's vengeance at the time of the attack without killing him, the defence set up has failed, and the defendant must be convicted. If you believe, his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such, prior to the attack upon him, as will deprive him of the privilege of setting up a defence of this nature. It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honor and natural right by which the killing may be justified. These are principles which you as jurors, and I as a judge, cannot recognize. The laws which we are sworn to administer are not founded upon them. Let those who choose such principles for their guidance erect a court for the trial of points and principles of honor; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you that no means of saving his life or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power, he has been guilty of manslaughter, notwithstanding you may believe, with the grand jury who found the bill, that the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

I ought not to rest here; for although I have stated to you that when a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may, from the existence of other circumstances proved against him, forfeit his right to a defence which the laws of God and man would otherwise have given them. If a man, for the purpose of bringing another into a quarrel, provoke him so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger kill his adver-

### SELFIDGE'S CASE: SELF-DEFENCE.

sary, he would be guilty of manslaughter, if not of murder, because the necessity, being of his own creating, shall not operate in his excuse. You are therefore to inquire whether this assault upon the defendant by the deceased was or was not by the procurement of the defendant; if it was, he cannot avail himself of the defence now set up by him. And here you are called upon to distinguish pretty nicely, and to attend to a part of the case which I thought was going too far back to have an influence upon this trial, but which the urgency of the attorney general and the consent of defendant's counsel finally induced me to admit. You have heard the whole story of the misunderstanding between the defendant and the father of the deceased; who was originally in the wrong, it is not for me to say, but I feel constrained to say that whatever provocation the defendant may have conceived to have been given him, and however great the injury which the deceased's father may have done him, he certainly proceeded a step too far in making the publication which appeared in the paper which came out on the morning of this unhappy disaster. To call a man coward, liar, and scoundrel, in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever. Such a publication is libellous in its very nature, as it necessarily excites to revenge and ill blood. Indeed, I believe a court of honor, if such existed to settle disputes of this nature, would not justify such a proclamation as the one alluded to. A posting upon 'Change or in some public place, we have heard of, but I never before saw such a violent denunciation as this in a public newspaper. Neither can I refrain from censuring the managers of the paper who admitted such a publication, for so readily receiving and publishing what in its very nature would tend to disturb the public peace. But, gentlemen, it is one thing for a man to have done wrong, and another thing for that wrong to be of a nature to justify an attack upon his person. If personal wrong, done by the father of the deceased to the defendant, would not justify him in publishing a libel, neither would the libel have justified the deceased or his father in attacking the person of the author of the libel. No man can take vengeance into his own hands; he can use violence only in defence of his person. No words, however aggravating, no libel, however scandalous, will authorize the suffering party to revenge himself by blows. If, therefore, Mr. Austin himself, the object of the newspaper publication, would not be justified had he attacked the defendant and beat him with a cane, still less would the circumstances have justified the unfortunate young man, who fell a victim to this most unhappy and ever to be lamented dispute. For however a young and ardent son may find advocates in every generous breast for espousing his father's quarrel from motives of filial affection and just family pride, yet the same laws which gov-

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ern the other parts of the case would have pronounced him guilty. but he lived to answer for the attack which was the cause of his death.

The laws allow a son to aid his father if beaten, and to protect him from a threatened felony, or personal mischief, and in like cases a father may assist a son, and should a killing in either case take place it is excusable; but neither one nor the other can justify resorting to force, to avenge an injury consisting in words however opprobrious, or writings however defamatory. You will therefore consider whether these facts, antecedent to the meeting on 'Change, can have much operation in the case, let which party will be found by you to be in the wrong. Upon the whole, therefore, of these circumstances, should you be of opinion that the defendant, in order to avenge himself upon the father of the deceased, prepared himself with the deadly weapon which he afterwards used, went upon 'Change with a view to meet his adversary, and expose himself to an attack, in order that he might take advantage of and kill him, intending to resort to no other means of defence in case he should be overpowered, there is no doubt the killing amounted to manslaughter; but if from the evidence in the case you should believe that the defendant had no other view but to defend his life and person from an attack which he expected, without knowing from whom it was to come; that he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise than by the death of the assailant; then the killing was excusable, provided the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent. Of all this you are to judge and determine, having regard to the testimony of the several witnesses who have given evidence to these several points in the defence. The principles which I have thus stated are recognized by all the books which have been read, and are founded in the natural and civil rights, and in the social duties of man.

The last subject on which I shall trouble you is the address which has been so forcibly urged upon your minds by the counsel on one side, and as zealously and ably commented on by the attorney general on the other, touching the necessity of excluding all prejudices and prepossessions relative to this cause. I do not apprehend these observations were in any degree necessary, as I cannot bring my mind to fear that the verdict of twelve upright, intelligent jurors, selected by lot from the mass of their fellow-citizens, will be founded on anything beside the law and evidence applicable to the case. Every person of this numerous assembly, let his own opinion of the merits of the cause be as it may, must be satisfied of the fairness, regularity, and impartiality of the trial, up to the present period; and sure I am that nothing which is left to be done by you will impair the general character of the trial. If you discharge your duty

## DALEY'S CASE: MALICE: RIOTOUS HOMICIDE.

conscientiously, as I have no doubt you will, whether your verdict be popular or unpopular, you may defy the censure, as I know you would disregard the applause of the surrounding multitude.

Least of all do I apprehend that party spirit will come in, to influence your opinions. However the storms of party rage may beat *without* these walls, I do not believe the time has yet come when they shall find their way *within*. Nor do I believe that a general apprehension is entertained, that a man accused of a crime is to be saved or destroyed according to the political notions he entertains. If ever the time should come, that a general belief shall be entertained that trials are conducted and judgments given with a view to the political character of the parties interested, vain and effectual will be the forms of your constitution, and useless the attempts to administer the laws. A general resistance would be the consequence, and if this belief should be founded in fact and in truth, that resistance would, in my apprehension, be perfectly justifiable; for no people would be bound to respect the *forms* of justice when the substance shall have vanished; when the fountains of justice shall be manifestly corrupt, and the forms and parade adhered to for the purpose of imposing on the citizens, and subjecting them to oppression under the garb of law.

You, gentlemen, will not be the first to violate the solemn oath you have taken, and seek for a conviction or an acquittal of the defendant upon any other principles than those which that oath has sanctioned. And as I trust that, in performing my duty, I have conscientiously regarded that oath which obliges me "faithfully and impartially to administer the laws according to my best skill and judgment," so that in discharging yours, you will have due regard to that which imposes upon you the obligation well and truly to try the cause between the commonwealth and the defendant, according to law and the evidence which has been given you.

Verdict, not guilty.

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## No. II.

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### DALEY'S CASE.

*Philadelphia Oyer and Terminer, 1844.*

(See *supra*, § 177, 180, 261, 332, 338, 480, 550.)

### CHARGE OF JUDGE KING.

GENTLEMEN OF THE JURY: After a session of excessive labor, we have arrived at the conclusion of the first of a series of causes, which,

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from the importance of their principles, and the intense interest felt by the community in their results, are without precedent in the history of this Commonwealth. It is not to be expected in the nature of things but that an investigation in which so much national, political, and even religious zealotry are involved, should exhibit the vehement excitement so painfully manifested throughout its progress. In none of these feelings does this court, in none of these feelings should this jury, participate. Our duties are holier. We are the chosen ministers of the people of a great commonwealth, called upon to decide between her and one of her citizens, who is said to have forfeited his life by the violation of her laws. Our trust equally demands that the public laws should be vindicated to the full extent to which they have been infringed; but that no particle of the rights of the accused guaranteed by those laws should be compromised in order to accomplish this end. Our duty is to punish offenders, not to immolate victims; to execute the public law, not to search after excuses for its violation. The task we have in hand is one requiring no common effort; but cool heads and honest hearts have achieved results more difficult. And rarely have these constituents of impartial justice been more urgently demanded. We have had given us versions of the unhappy events leading to this homicide, coming from sources apparently equally trustworthy, seemingly irreconcilable with one another.

To those familiar with judicial investigations there is no novelty in this. We are perpetually observing that witnesses, apparently equally honest, describing transactions occurring in large, tumultuous, and highly excited assemblies, are in some of their statements, respecting even prominent facts, in direct collision. These discrepancies may arise from various circumstances. One man, from his immediate contiguity to the scene of the occurrence he describes, from his attention being particularly directed to it; from his nervous organization, being cool in the midst of danger and excitement, and from the natural superiority of his observing faculties, may truly detail actual events of instantaneous occurrence, which another, of equal integrity and seemingly with the same means of knowledge, but less favorably circumstanced, has not noticed, and therefore denies to have existed. The jurist, familiar with the nature and course of these disturbing influences, makes the just allowance for them, and endeavors to reconcile such conflicting statements. Where some witnesses testify to an occurrence happening under their direct observation, and others swear they were present and did not see it, if the thing said to have happened be such as it may reasonably be supposed some might see or hear, and others not, by reason of any of the causes stated, the jurist rather concludes both have given their exposition of the facts honestly, than that either has forsworn himself. But if witnesses are in such direct collision that their testimony cannot be reconciled, the duty of the



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inquirer after truth becomes more complicate. He should first consider the number of witnesses on each side, as multiplied perjury is less probable than individual instances.

He should then consider the capacity of the witnesses for observation, having regard to their apparent intellectual power, and steady coolness of character, as displayed in delivering their testimony. He should, however, have especial regard to the relative indifference of the conflicting witnesses to the point in question. Where two men testify to the same fact, in direct opposition to each other, the one having no particular interest, sympathy, or prejudice on the subject matter of investigation, the other manifesting all the heat, bias, and zeal of an excited partisan, we are certainly more likely to obtain unvarnished truth from the former than the latter. In any and every case assuming from its circumstances a partisan character, it is always safest, if practicable, to come to our conclusion as to its real merits through lights drawn from sources having no connection with either of the contestants. Finally, in estimating the comparative forces of conflicting testimony, you are to look into the probability or improbability of the respective statements arising from the nature of the subject in question. Having tried them by these tests, you should adopt the one most consonant with the convictions of your understanding.

In a case like the present, which is readily divided into several distinct and prominent parts, you will be greatly aided by taking up these parts in detail, and in the order of their occurrence. In no other way can truth be so well arrived at, in a transaction extensive and complicate in its incidents, and testified to by numerous witnesses. If in such an inquiry we look only to the testimony of an individual in order to form an opinion of the whole transaction, we are involved in contradictions which want of ability in the witness accurately to cover the whole ground of inquiry must almost inevitably produce.

This will be avoided by the more philosophic mode of examining the proofs of each subdivision in detail, and forming conclusions of the whole transaction in connection, by the aggregation of the results of inquiries as to each distinct part. This mode of arriving at truth may indeed be more tedious than by blindly attaching exclusive faith to individual statement. But the present is a case in which we are called upon to spare no labor to get at exact and certain truth; one in which nothing would justify impatience or indifference in its investigation. If we desire that the result of our toil be received with the respectful and deferential acquiescence which ever follows impartial and honest judicial action, we must manifest that we have commenced and concluded our labors with an exclusive view to equal justice, and that our decision arises from

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the sober deductions of reason and judgment, anxiously and conscientiously applied to the facts and law of the case.

In the present state of our mutual exhaustion, I will not attempt a full recapitulation of the voluminous testimony in the cause, all of which has been reduced to writing, and accessible if required. I will content myself with a summary of the case as represented by the testimony of the commonwealth and defendant respectively, so far as such summary seems necessary for the clearer understanding of the principles of law in which the opinion of the court are applicable to each version of the facts assumed by the commonwealth and defendant.

[Here follows an analysis of the evidence.]

When the testimony relating to the events of Tuesday is carefully collated and compared, the extent of the collision between the different witnesses is not so serious as would at first be supposed. The essential point of difference between them, is as to when the Irish party first fired, whether before or after the Hibernia hose-house was rushed upon and broken into by a portion of the meeting. The commonwealth's witnesses, who speak directly and affirmatively to this part of the case, declare the first fire to have come from the hose-house, before any attack upon it. This is as distinctly denied by the defendant's witnesses, who assert the first fire to have followed the assault. In point of numbers, the witnesses of the defendant certainly preponderate, and there are among them many native American citizens, having no apparent connection with either of the conflicting parties. It is for you to consider and determine on which the greatest reliance is to be placed. From the whole testimony it also appears that the meeting was generally routed by the first firing, and that the subsequent bloody contest was between the assailants of the meeting and a body of armed men, who rallied and formed on the vacant lot on the north side of Jefferson Street, whose appearance and conduct are clearly described by Mr. Martin. It was about this time that Hammit was killed. Shields, his companion, says that he heard the guns going off over by the market, about five o'clock; that he went over to the property of John Rox, corner of Second and Master streets, and after seeing the firing and riot, he "backed out a little while; that he saw Mr. Hammit coming up Master towards Cadwalader Street; told him he had better stay from there, but Hammit said he would go, and refused to take his advice, saying he would "stick to the rioters." This testimony would seem to fix the time of Hammit's approach to some time after the firing began, and to render it probable that he acted in unison with the armed body described by Mr. Martin. I will conclude this summary by calling to your recollection the testimony as to the previous good character of the accused, which, if the proofs of his guilt are at all doubtful, will receive its due estimation in your deliberations.

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If the call of the meeting of the 3d of May was addressed exclusively to persons favorable to its objects, the interference of individuals hostile to its proceedings, and the breaking up and dispersion of the meeting by them, was a gross outrage on the rights of those who called it. It was a riot of a flagrant kind. Any body of citizens having in view a constitutional and legal purpose have the right peaceably and quietly to assemble together for its consideration and discussion. Any attempt by another body of citizens opposed to the objects of the assembly, to interrupt and disperse it, is not to be tolerated. In this instance it has led to the long train of riots, murders, and arsons, which have disgraced our city and shaken the foundations of social order. American citizens, native and naturalized, should act on the principle that error is harmless while reason is left free to combat it. Every attempt, by force and violence, to interfere with the rights of citizens, to meet and discuss proposed lawful public measures, is the direct infraction of a vital principle of our institutions, state and national. But a public meeting, otherwise legal, may, from the manner, place, and circumstances of its organization, become an unlawful and even a riotous assembly. Thus, if it is true, as has been stated in proof here, that the meeting of the 7th of May, in Independence Square, was convened under a notification to those who attended it to come armed; if in pursuance of such a suggestion, it was attended by persons armed with deadly weapons; if the meeting so summoned and assembled adjourned to march in a body to a place principally inhabited by citizens notoriously opposed to its objects, openly exhibiting arms, and displaying banners containing inscriptions lacerating to the feelings of such citizens, the assembly sunk from the dignified position of a body of freemen exercising a great constitutional right into a mere riot. The adjournment of this meeting to Kensington was as imprudent as it was illegal and disastrous; and it is to the credit of some of the gentlemen concerned in getting it up, that they strove against it; and most unfortunately for this community their sober counsels were disregarded, and those of rash and hot-headed zealots adopted. The sorrowful history of the 7th of May would not have been found in our city's annals, nor the painful task imposed on us, of deciding the solemn question whether many of our fellow-men shall live or die for acts consequent upon this adjournment. In expressing the opinion of the court on the legal principles involved in this inquiry, I will, after noticing the general doctrines discussed, examine those urged by the commonwealth, as requiring the conviction of the accused; and afterwards consider those insisted upon as demanding his acquittal. In performing this duty, I shall simply expound principles, leaving their application to you.

Murder, as defined by the common law, is when a person of sound

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no other conclusion but that the death of the victim was intended. Thus, if one man shoot another through the head with a musket or pistol-ball; if he stab him in a vital part with a sword or a dagger; if he cleave his skull with an axe, or the like; it is almost impossible for a reflecting and intelligent mind to come to any other conclusion than that the perpetrators of such acts of deadly violence intended to kill. I have put strong instances in order better to exemplify the principle. In its practical application, a variety of cases less urgent in their circumstances will necessarily arise. It is true, the act says the killing must be wilful, deliberate, and premeditated. But every intentional act is of course a wilful one, and deliberation and premeditation simply mean that the act was done with reflection, was conceived beforehand. No specific length of time is required for such deliberation. It would be a most difficult task for human wit to furnish any safe standard in this particular. Every case must rest on its own circumstances; the law, reason, and common sense, unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of premeditation. Whether the fact of killing was or was not malicious still constitutes the great inquiry on the trial of every indictment charging murder. For even where the intent to kill is unquestionable, still the killing must be malicious, to constitute murder. Where the killing is without malice, though it be unlawful, it is but manslaughter. If, therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go in a field and fight, and one be killed, it will be but manslaughter in the survivor, because it may be presumed that the blood never cooled. And it must be observed with regard to sudden encounters, that when they are begun, the blood previously heated kindles afresh at every blow, and in the tumult of the passions, in which the mere instinct of self-preservation has no inconsiderable share, the voice of reason is not heard. Therefore the law, kindly appreciating the infirmities of human nature, extenuates the offence committed under such circumstances, from murder to manslaughter. In the whirlwind of passion accompanying such illegal conflicts, the law supposes that malice aforethought, the vital element of murder, does not exist. In one view of this case, this doctrine may become material to be regarded. A man may repel force by force in the defence of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defence in cases of this kind is founded on the law of nature, and is not nor can be, superseded by any law of society. Where a known felony is attempted upon the per-

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But a mere trespass on a man's property, not his dwelling-house, will not justify the owner in taking away the life of the aggressor in protecting it. For the rule of the law is, that where such trespass is barely against the property of another, not his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do so, and with it kill the trespasser, this will be murder, because it is an act of violence beyond provocation; but if the injury be inflicted with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter,—the law so far recognizing the adequacy of the provocation arising from the trespass. Under what circumstances the lives of rioters concerned in the commission of unlawful acts may be justly taken by officers or citizens, I have had occasion already to express during the present term. I then stated that where an actual riot exists, particularly when life and property are threatened by the insurgents, citizens may, of their own authority, lawfully endeavor to suppress the riot, and for that purpose may even arm themselves; and that whatever is honestly done by them in the execution of that object will be supported and justified by the law. But I expressed my opinion then, and I still think, that citizens using such force had better be assistant to the sheriff and public functionaries than to assume such an urgent authority, except in cases of the extremest necessity. But if, under proper circumstances, the law will extend to citizens the same indemnity in resorting to extreme measures for the suppression of dangerous riots that it affords to officers acting for the like object, it will certainly extend no greater. How this authority is to be exercised by sheriffs, I have expressed in the opinion referred to, in these words: "When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore peace, and prevent criminal outrages against

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person or property. They may arrest rioters, or detain and imprison them. If they resist the sheriff and his assistants in their endeavor to apprehend them, and continue their riotous actions under such circumstances, the killing becomes justifiable." There is nothing here said or intended to convey the idea that a mere unlawful, or even riotous assembly, can be shot down by musketry without any previous effort being made to suppress it by less bloody and more pacific measures. It is when the conservator of the peace is contemned and resisted, and the law and its ministers set at defiance, that he is authorized to vindicate its majesty at all hazards. Riotous and turbulent as may have been the meeting on the 7th of May, in its organization in the Independence Square, and its progress to the Washington Market, no one, whether private citizen or public officer, would have been authorized to fire upon it until other means were resorted to for its dispersion, and necessities arose from the manner and extent of the resistance to such means, demanding extremities. The law recognizes the existence of a necessity for the suppression of riot and rioters, by extreme means; but it is a necessity only justifiable in extreme cases. Where indeed rioters exhibit a spirit that manifestly would mock expostulation; where they at once enter upon a predetermined work of destruction, and execute it under circumstances of violence and ferocity; and with the display of force, clearly manifesting that delay in action, for the employment of remonstrances, would be useless and pernicious, then such a mob may be regarded and treated as a common enemy.

But the demonstration on the Hibernia hose-house and carriage, admitting it to have preceded any attack on the assembly in the market, presented no such contingency as justified the firing on the boys and men engaged in it. Before this, no felonious assault was made on any other property; none certainly which called for or produced a fire on those perpetrating it. The attack on the hose-house, and the removal of the apparatus for the purpose of its destruction, was the aggression followed by the firing. This was a gross trespass, deserving of severe legal punishment, but it did not justify the use of deadly weapons which followed it, even by the owners of the property, much less by strangers at a distance from the scene of action, — such, as the armed occupants of Jefferson Street, the Germantown Road, and that vicinity. If death had followed that rash and wicked act, all the actors in it would be guilty of murder at the common law certainly. But neither Matthew Hammitt nor any other individual, as far as the proofs are before us, was killed by this fire; and hence the legal liabilities incurred by those by whom it was perpetrated are not the primary subjects for consideration in this investigation, although they may become matters of future examination. The true legal character of this act may be of importance in another view to



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be taken of this case hereafter. Hammitt was killed after the first attack, and after the friends of the meeting had rallied and commenced returning the assault of those who were guilty of the first illegal firing. Such a course was most natural under the circumstances, it is true. But nevertheless, was it legal? The law permits no man to be his own avenger. Vengeance belongs only to the Most High. Instead of such a movement, the injured parties should have appealed to the laws for justice and protection. The act went beyond the necessities of self-defence, which are limited to the immediate resistance of aggression. Should this right be conceded to the extent assumed, the wild ferocity of private vengeance would usurp the place of the public vindication of law, and social security and order would wither under the heated atmosphere of passion. I speak not now of the case of a lawful assembly illegally attempted to be dispersed by force and violence, and persisting, in the face of such opposition, to maintain its right to assemble, at all hazards. That question is reserved for the occasion in which it shall arise. But the meeting of the 7th of May, we have said, was, if the defendant's testimony is believed, from its attending circumstances an unlawful assembly. This character was conceded to it by the attorney general. It was unlawfully, indeed, assaulted, and if death had ensued, the assailants would have been guilty of murder. But an unlawful assembly, unlawfully assailed and dispersed, has certainly no legal right to reassemble with deadly weapons to attack and destroy those who have so assaulted them. By so doing, they are usurping the authority of the law. But if in the heat of excited passion consequent upon such wrong, they should "presently fetch their weapons, and go into a field and fight," and in the combat one of the original assailants should be killed, it would only be manslaughter in them, because the law would presume their blood had never cooled since the first aggression. If the original assailants in this renewed combat should, without malice, kill any of the party so returning to the affray, they would be equally guilty of manslaughter; for they were the first aggressors, and the wrong done by them originally led to the homicide. They occupy the position of one of the parties engaged in a mutual unlawful combat, where either of the contestants slaying his opponent is guilty of manslaughter.

The attorney general has put the case in one point of view, which, if sustained by the proof, would make the killing of Matthew Hammitt a murder of the first degree. He insists that the whole case shows an original and formed design in the defendant and his associates to disperse any meeting having for its object that contemplated by the meeting of Friday, the 3d of May, and to destroy and kill those concerned in it, if their object could be accomplished in no other way. He insists that the whole conduct of Daley and his associates manifests that such was their

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intention, and that the affair of the hose-house was a mere pretext to cover a deeper and deadlier design. If you should believe that the arming and array in the vicinity of the market was really with this diabolical motive, and that the slaying of the deceased and all others who fell on that day was the product of such a design, and done in the consummation of it, then all those concerned in this deed, principals, aiders, and abettors are guilty of murder of the first degree; although Hammitt might have been guilty of manslaughter only, had he been the slayer. Whether the facts proved justify this inference is for your decision, and yours only. The court distinctly leave that question exclusively to you, without designing in the slightest degree to interfere with your judgment.

Finally, the defendant's counsel, in their zealous and eloquent argument on the plea of justification, insisted that all the facts of the case show that the object of the assembly of the 7th of May at the market-house was to sack and destroy the houses, and injure and abuse the persons of those with whom the defendant was in connection on that occasion; that they marched to the scene of contemplated violence with arms and banners displayed, threatening vengeance and destruction; that they actually assailed persons and dwellings; that the wives and children of the assailed were forced to fly for safety and protection to the highways, and to the hospitable roofs of the charitable; that if, in their terror, they may not have measured the defence with the cool accuracy of a court and jury, secure in the dignity of their position, a slight excess should not change them from the condition of injured and persecuted men, vindicating the rights of humanity, into that of condemned felons. How far these positions are just inferences from evidence is for your decision. If sustained, a case of justifiable self-defence would be made out.

In our opinion the indictment is sufficient, and under it you can convict the defendant of murder in the first or of the second degree, of manslaughter, or entirely acquit him.

I have now, gentlemen, given you the united views of the court as to the law of the case. It is for you to apply the facts to those principles, and render your verdict accordingly, always remembering that the dictates of your conscientious judgments should alone influence your conclusions.

## HARE'S CASE : MALICE : RIOTOUS HOMICIDE.

### No. III.

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#### HARE'S CASE.

*Philadelphia Oyer and Terminer, 1844.*

ISAAC HARE was put upon his trial charged with the murder of Joseph Rice, during the riots in Kensington in May, 1844. The following charge was delivered by King, President, who prefaced it by referring generally to the facts out of which arose the legal principles contended for by the commonwealth and defendant respectively. After observing that it was not his intention to express any opinion upon those facts, but to leave them exclusively to the jury, he proceeded as follows:—

The doctrines of the law may be thus summed up; and we desire you to receive them as our judgment on the principles which we think ought to guide your deliberations. If from the proofs before you it has been made to appear that Hare, and others with whom he was in association, after the original assault on the meeting of the 7th of May, and the dispersion of that meeting consequent upon it, left the scene of action, gathered arms and friends, and returned, and there commenced burning the houses and property of the assailants, and firing upon and killing, or endeavoring to kill them, for the purpose of avenging the wrongs they had suffered, and not for the purpose of arresting and bringing the original offenders to justice, then their conduct was illegal and unjustifiable, and they each and all are criminally liable for all the consequences flowing from such acts of unauthorized vengeance. The law does not and will not permit any individual or body of men to become their own avenger, and if they attempt it, and injuries to person or property follow, they are criminally responsible for their conduct. If courts of justice should once recognize this wild right of private vengeance, it is evident that the bands of social order and security would be torn asunder, and the cannon and the musket become the substitutes for the bench and the jury box, in measuring out the nature and amount of punishment to offenders against public law. The concession of such a right of self-vindication would be the immediate and complete demolition of all public safety, the surrender of all the powers of government, and the termination of the supremacy of the law.

If any citizen or body of citizens are injured or aggrieved, the vindication of their infringed rights belongs exclusively to the civil government; and if they attempt to forestall the public arm and undertake to chastise those from whom they have suffered wrong, they are acting as much in opposition to public justice as the original aggressors. Let me

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not, however, be here misunderstood: I do not mean at all to question the sacred and unalienable right of self-defence,—a right derived from the laws of nature, and superior to anything emanating from human law-givers. By virtue of this inherent right, any man assailed by another, under circumstances manifesting an intention to take life, or do great bodily harm, may immediately resist the assailant, even unto death. He may even, under circumstances of urgent and manifest necessity, anticipate the blow of an assailant threatening such an attack, and strike him down before his deadly intention is followed by an actual assault. But when a man so assailed has retreated from the assailant, and is secure in his separation from farther personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new contest with the aggressor. If he does so, and slays him, he is guilty of murder or manslaughter, according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leaves the scene of outrage, procures arms, and in the heat of blood consequent upon the wrong, returns and renews the combat, and slays his adversary, both being armed, such a homicide would be but manslaughter. For the law, from its sense of and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind, smarting under the original wrong. And such I said in Daley's case was the position of any who, after the illegal firing on the citizens on the 7th of May, hastened and gathered friends and arms and returned to the scene of assault, having in view the destruction of those who were guilty of the outrage, if they subsequently killed any of the original aggressors. Parties meeting and entering into deadly conflict, under such circumstances, are all criminals—perhaps in different degrees, having regard to those who were the first and unprovoked assailants. And if human life is taken in such a combat, renewed by common consent, the slayer and all aiding, abetting, and assisting him are at least guilty of manslaughter. Masses of men have no more right to engage in such general and mutual combat, than individuals have to array themselves against each other in private duel. If life is taken in either of these cases, the offenders, their aiders, and abettors are guilty of felonious homicide. The law does not stop to inquire into the relative merits of such violators of the public peace, but regards them all as obnoxious to censure and punishment.

If during such a scene of unlawful violence an innocent third person is slain, who had no connection with the combatants on either side, nor any participation in their unlawful doings, such a homicide would be murder at common law in all the parties engaged in the affray. It would be a homicide, the consequence of an unlawful act, and all par-

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ticipant in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms between two bodies of enraged men should take place in a public street, and from a simultaneous fire innocent citizens, their wives, or children in their houses, should be killed by some of the missiles discharged, — shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, you are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the public highway of a thickly populated city, are they to have the benefits of impracticable niceties, in order to their indemnity from the consequences of their own conduct? Take the present case as exemplifying the effects of such a doctrine. Joseph Rice was killed within the inclosure of his house, at a time when the probabilities are that both belligerents were maintaining a desultory fire upon each other, and hence it becomes difficult to say with positive accuracy by which he was killed. Are the party at the market to escape the consequences of his death by raising a doubt whether a shot from their opponents at Jefferson Street, Harmony Court, and the Germantown Road may not have killed him? Such a doubt must equally enure to the benefit of those opponents, should they be placed on trial for the same offence; and between these doubts the life of a citizen is taken with impunity. Is it not both a juster and a wiser course to say that both were alike offenders when the homicide was perpetrated, and both are alike chargeable with its consequences? Is it not of the deepest moment to the future peace and safety of the community, — is it not of all things that best calculated to prevent our streets from becoming, hereafter, bloody arenas where enraged and lawless men shall settle their disputes with weapons of death, alike calculated to reach the combatant and the non-combatant, — to at once declare, that for every drop of innocent blood shed in such a scene of outrage, every man who is taking a part in such an infraction of the law is equally guilty? Such we believe to be the law, founded on the plainest reason, justified by the clearest expediency, and demanded by the most obvious necessity. A homicide committed under such circumstances would not, however, be a murder of the first degree, because there would exist no such malice as is required by our statute to constitute that crime. At

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common law such a homicide would be murder, reduced, however, by the act of 1790 to murder of the second degree.

But if one or more of the parties so engaged in an unlawful combat deliberately fire at and kill an innocent third person, taking no part in the conflict, having no just reason to regard him as one of the belligerents, such killing would be murder of the first degree. It would present the case of a wilful, deliberate, and premeditated killing, perpetrated with an instrument likely to take life, rendering the actual perpetrators guilty of the highest grade of crime known to our criminal code. If the testimony, in your judgment, brings clearly home to the defendant such a charge, he should be convicted. If, however, the commonwealth has not fully satisfied your minds in the affirmative of this position; or if the proofs adduced by the defendant have rebutted this allegation, or thrown a fair doubt upon its certainty, then you ought not and cannot justly convict him of that part of the charge involving capital punishment.

The defence, besides denying the adequacy of the proof to establish the identity of the defendant, either as one of the parties actually killing Rice, or as being one of others acting in concert by whom he was killed, and assuming, for the sake of the argument, that Hare was present when he was so killed, insists that the killing was justified, first, as being done in self-defence; and second, as being done by those with whom Hare is said to have been associated in an honest endeavor to repress a dangerous and bloody riot, and to bring its perpetrators to public justice. In order to raise the first point, it is argued that there was no cessation of the mutual firing between the combatants from the first onslaught; that Rice was acting with the original assailants armed and engaged in the firing, and that he met his death in the resistance made to the murderous assault committed by himself and his associates on the defendant and those united with him. If it is true that the attack with deadly weapons on the meeting of the 7th of May was instantly returned by those unlawfully assailed; that they continued it in order to the preservation of their own lives, which, by no other practicable and reasonable means, could have been preserved, by reason of the sudden, fierce, and deadly nature of the assault upon them; if Rice was engaged in this assault, and fell from the resistance of the assailed, rendered absolutely and indispensably necessary from the suddenness, violence, and extent of the assault, a case of homicide in self-defence, and as such justifiable in law, has been made out, and the defendant is entitled to an acquittal. But still, if the return of the fire was not an immediate act; if the proof shows that the assaulted party retired, armed themselves, returned to the scene of original violence, and there voluntarily and without any necessity in order to the preservation of their lives, renewed the combat for the object of inflicting even what they supposed just chastisement on their opponents, the

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doctrine of self-defence has no relevancy to the case. The plea of self-defence rests on the natural right every man has to protect his own life against an unlawful assault upon it by another. If, however, when secure from danger, by his actual removal from the threatened assault, he voluntarily returns to meet his adversary, and renews the combat, it cannot be pretended he acts in defence of his own life against impending and inevitable destruction. He assumes, under such circumstances, a new character. He becomes a party voluntarily entering into an unlawful conflict, and is responsible for all the consequences following his new position. You are, however, the exclusive judges of the facts of this case, and if you are of opinion that Hare was actually present and participated in the affray that led to the death of Rice, but are satisfied from the proof that a case of excusable self-defence has been made out within the principles of law, as expounded by the court, you ought to acquit him.

As to the second ground of justification assumed. In a previous case tried in this particular, nearly under the same facts, it was considered by us that the weight of the testimony established the first firing to have followed the attack on the Hibernia hose-house and carriage; that this firing was unauthorized by law, under the facts disclosed in the evidence; and that if death had followed this fire, it would have been murder in those who were guilty of it. I then was of opinion, and so continue to think, that the weight of the evidence shows that the party on Jefferson Street, Harmony Court, and the Germantown Road were fully prepared for this fire before the meeting approached the Washington Market. It is now urged that this assembly of armed men having illegally fired upon the meeting at the market, it was competent for all good citizens to endeavor to bring them to justice, and the doctrine of my charge to the grand jury is invoked as containing principles which would justify the assemblage of citizens, and even the use of arms, in order to bring such offenders to justice.

From no doctrines laid down in that charge are we prepared to depart, and the defendant shall have the full benefit of any of them which the facts of the case entitle him to invoke. Those doctrines were well considered, and will not be lightly changed. We there said: "Citizens may of their own authority lawfully endeavor to repress riots, and for that purpose may even arm themselves, and whatever is honestly done by them in the execution of that object will be supported and justified by the common law." But, as was said then, "it would be more discreet in such cases to be assistant on the justices and sheriff." Undoubtedly, if the peaceable citizens of Kensington, after the meeting of the 7th of May, 1844, had been unlawfully assailed and dispersed, and assembled together for the purpose of restoring the public peace, and arresting the offenders by whom it had been broken, they might rightfully employ all the force necessary to restore

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order and bring the criminals to justice. But this kind of popular vindication of public law and order is most hazardous at best, and those who assume upon themselves public functions must be wary in the exercise of them. The law will justify what is "honestly done by such citizens," but nothing more. If, under the pretext of maintaining the public order, men become themselves infractors of it, they are really more worthy of punishment than the unequivocal offender, for they add hypocrisy to crime.

If, under proper circumstances, the law will extend to citizens the same indemnity in resorting to extreme measures for the suppression of dangerous riots that it affords to officers acting for the like object, it will certainly extend no greater. How this authority is to be exercised by sheriffs, I have expressed in the opinion referred to in these words: "When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore peace and prevent criminal outrages against person or property. They may arrest rioters, detain and imprison them. If they resist the sheriff and his assistants in their endeavor to apprehend them, and continue their riotous actions under such circumstances, the killing them becomes justifiable." There is nothing here said or intended, to convey the idea that a mere unlawful or even a riotous assembly can be shot down by musketry without any previous effort being made to suppress it by less bloody and more pacific measures. It is when the conservator of the peace is contemned and resisted, and the law and its ministers set at defiance, that he is authorized to vindicate its majesty at all hazards.

If the sheriff and his posse engaged in suppressing a riot, should burn down private houses and public buildings; should array themselves in hostile conflict against the alleged offenders, and unnecessarily and wantonly take their lives, unquestionably their official character would operate in no other way than to increase the atrocity of the offence. So in this case, if the citizens who assembled after the dispersion of the meeting of the 7th had not in view the vindication of the public law, and the arrest of the violators of the peace, but were really influenced by angry and revengeful feelings, which led them to engage in an open street fight, in order to punish the original aggressors, they never can be classed with the sheriffs and justices of the peace, and their assistants, engaged in suppressing great and dangerous riots. Nor can they claim the indemnity for extreme measures given by law to such public agents acting *bonâ fide* in the support of the public law.

If, however, the commonwealth has failed in proving Hare to have been present at the time of the conflict between the Jefferson Street and Washington Market parties, during which Rice was killed; or if the defendant's evidence has thrown a fair doubt on that fact, he is entitled to your



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verdict. And if from the evidence you are satisfied that Rice fell resisting the law, by hands of citizens, *bond fide* and honestly engaged in the endeavor to restore order and bring offenders to justice, and that such killing was necessary and indispensable, in order to accomplish these objects, and that Hare was really and truly engaged at the time as a good citizen, striving to maintain the supremacy of the laws, he is equally entitled to your verdict. But if the testimony proves to your satisfaction that Hare and others, after the assault on the Tuesday meeting, retired and collected arms and men, returned to the scene of aggression, and in pursuit of satisfaction for the wrong done him and them, entered into a combat with the aggressors in the streets of Kensington, with fire-arms; and if, during the combat, Joseph Rice, an innocent and unoffending citizen, fell by a shot from any of those so unlawfully engaged, it is murder of the second degree, in Hare and all others engaged in the unlawful acts which resulted in his death. It is also important for you to understand that under this bill you may convict of murder of the first or second degree, or of manslaughter, or you may generally acquit. The facts of the case are for your exclusive consideration. We give no opinion upon them, contenting ourselves with declaring principles, leaving their application to the facts to you, to whom this important branch of public justice pertains by the constitution and laws of the commonwealth.

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#### No. IV.

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#### SHERRY'S CASE.

*Supreme Court Pennsylvania, 1845. (See supra, § 190.)*

BEFORE Mr. Justice Rogers, of the supreme court of Pennsylvania, at a special court of nisi prius held at Philadelphia, in April, 1845.

This, and the then undisposed of cases arising out of the riots of 1844, having been removed to the supreme court by certiorari, a jury was called on the 29th of April, 1845, the defendant pleading not guilty. Three days were occupied in calling a jury, in the course of which the following questions were put by the counsel for the defendant :—

Question. Could you conscientiously agree to a verdict of murder in the first degree, death being the punishment?

Answer. I am conscientiously scrupled against the death punishment, and against anything that would involve it; though if I was sworn in a case, I might be forced to convict if the evidence required it; though against my scruples. The court held that the juror must be excused.

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Q. Have you formed or expressed such an opinion as to the comparative merits of the controversy in Kensington, as would affect your action as a juror?

A. I have. The court held the juror incompetent.

Q. Have you formed or expressed an opinion as to the guilt or innocence of either of the parties in Kensington?

A. I have. The court held the juror incompetent.

A jury having been at last obtained, the commonwealth's case was opened by Mr. F. Wharton, assistant attorney general. A series of witnesses were then examined, who testified to the same general outline of facts as was detailed in the case of John Daley, a summary of which has been already given. Great doubt existed, however, as to the personal participation of the defendant in the affray, and in consequence of the lapse of time, and the general softening of partisan temper, the evidence on both sides harmonized much more readily than on the earlier trials.

After the evidences were through, the jury were addressed by Mr. Wharton and Mr. Kane, attorney general, for the commonwealth, and by Mr. H. M. Phillips and Mr. D. P. Brown, for the defence.

Judge Rogers charged the jury substantially as follows:<sup>1</sup>—

You are, it is true, judges in a criminal case, in one sense, of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. The popular impression is, that this power to definitely close a prosecution by an acquittal arises from a right on the jury's part to decide the law as well as the facts according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law, that no man can twice be put in jeopardy for the same offence. No matter from what cause an acquittal results, the defendant cannot be retried. If, for instance, it should result from a usurpation by the court of the facts of the case which undoubtedly belong to the jury, the acquittal would be final; and yet it would be very improper to draw from such a result the assumption that the disposition of the facts belongs to the court. It is important for you to keep this distinction in mind, remembering that while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. The sanctity of your conclusions in case of an acquittal arises not from any inherent dominion on your part over the law, but from the principle that no man shall be twice

<sup>1</sup> This charge was noted by the editor at the time, and is now reported from his notes.

put in jeopardy for the same offence, — a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the attorney general. You are bound, notwithstanding this, to conform your verdict to the law of the land, in the same way that the two latter functionaries are bound to conform their conduct to the same standard; for it would be productive of the wildest consequences to establish the principle, that any officer whatever, in a criminal case, should be relieved from the restraint of the law as settled in a uniform system by the supreme authority. For your part, your duty is to receive the law for the purposes of this trial from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or an acquittal against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court, and the facts to the jury. My duty is, therefore, at the outset, to charge you, that while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the court.

The learned judge, after recapitulating the testimony, thus proceeded:—

Resolving this into its elements, and stripping it of party names and badges, we have the spectacle of two factions arrayed against each other, in a bloody contest for supremacy. It is not the ordinary case of a riot, in which the government is on one side and a mob on the other. Here there was no political question whatever leading to either insurrection or uproar. Neither side moved with the purpose of effecting any public object by an agitation against government, though each in turn, as it came in conflict with the public authorities, chafed against the hand that sought to restrain it. The difficulties originated in a street fight between two distinct interests of society, — comprising on the one side a portion of the Irish Roman Catholics, and on the other the Irish Orangemen, together with such portions of the American population as sympathized with them. It is true, that subsequently, when the latter interest preponderated, and proceeded to destroy the churches and other public buildings of their opponents, the civil and military authorities, as well as the friends of good order generally, arrayed themselves on the side of the former. But this was for a temporary purpose only, disconnected entirely with the partisan conflict. At the period which concerns this trial, as well as generally throughout the riots themselves, the only

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thing that the law knows is, that there were two distinct and lawless parties, who undertook to settle private and social grievances which they had against each other, by a resort to fire-arms in the public streets.

What, then, is the law in such a case? I say unhesitatingly the law is, that if in such a conflict death ensues, all parties are guilty of murder at common law. They are engaged in an unlawful design, which is the first ingredient of murder, and it is only necessary to consummate the offence, that death should be the consequence. It is not necessary, in order to charge a particular offender, that he should be proved to have fired the particular gun, or discharged a particular missile, that caused the fatal wound. In the contemplation of the common law, where a mob of ten thousand is engaged in an unlawful design, and one of them, not out of special malice, but a general design to do harm, fires a gun, they all are to be considered as having pulled the trigger. But while such is the common law, the Pennsylvania act of 1794, by creating a distinction between murder with a specific intent to take life, and murder without such intent, has established a test, which it becomes your duty in the next place to consider. The reason of the establishment of the new grade undoubtedly was the inhumanity of attaching capital punishment to anything under an actual and specific intention to take life. Was there such an intent here? It is for you to say whether the parties who formed the mob, or either of them, were actuated by so incredibly malignant a temper. It will be well for you to consider, whether the object of such outbreak and of such intent was not rather to humble than to slay an adversary; rather to chastise than to annihilate. But be this as it may, I charge you that no special malignity on the part of an individual or individuals, against a specific object, can affect his associates with the grade of the guilt incurred by himself. They are answerable for the common design of those with whom they associate; not for the private design of individuals. Should you find that the object of the conflicting parties in the riot in which the deceased found his death was merely to humble and repulse each other; should you reject the theory that their object was death and annihilation; then your finding will be for murder in the second degree.

The next inquiry for you will be whether there was such provocation towards the defendant, or the party of which he was a supposed ingredient, as to lower the offence to manslaughter. Was the homicide both conceived and committed in hot blood? Was it throughout the result of passion, induced by an adequate exciting cause? If so, the offence is manslaughter, provided two qualifications are understood. In the first place, no breach of a man's word; no mere trespass on his lands or goods; no insults by words, however irritating, will form a sufficient provocation. In the second place, even where the provocation was

originally adequate, if the party offended withdraws, and then, after having had time to cool, procures weapons, and having fetched them to the scene of conflict, kills his assailant, the offence is murder, subject to the limitations as to degree which I have already mentioned.

It becomes necessary for me now only to advert in conclusion to the state of facts which will be necessary to sustain an acquittal on the ground of necessary homicide. A man when driven to the wall by an assailant, who to all appearances intends to take his life, or do him grievous bodily harm; whose house is attacked by armed men, or who has no other means of resisting the commission of a felony on himself, his family, or his property, may take the life of his assailant. You must recollect, however, that a defence such as this, as well as that of provocation, must be proved to your satisfaction, the burden being on the defendant.

The defendant was acquitted, it being understood that there was a defect of proof as to identity.

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No. V.

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COMMONWEALTH v. UDDERZOOK.

THIS case is frequently referred to in the text as one of the most remarkable, so far as concerns the question of the *corpus delicti*, that is on record. See *supra*, § 684, 689, 690, 708. Judge Butler's charge, accessible elsewhere only in pamphlet form, is here given in full, not only because its law was sustained by the supreme court of the state, but because it condenses with accuracy the evidence given on the trial.

CHARGE OF THE COURT.

*West Chester, Penn., November 7, 1873.*

GENTLEMEN OF THE JURY: The prisoner at the bar, as you have learned, is charged with murder.

This offence consists in the unlawful killing of any human creature, under the peace of the commonwealth, with malice aforethought. The distinguishing criterion of the crime is malice aforethought. For the purposes of the case we are trying, it is sufficient to say that where one individual maliciously takes the life of another, he is guilty of murder.

The case of the commonwealth rests upon what is known as *circumstantial* evidence. And indeed where wilful, deliberate murder, con-

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templated beforehand, is committed, it rarely occurs that direct, positive evidence respecting it exists. Perpetrated, as it usually is, by lying in wait, by means of poison, or by falling upon the victim when no one is by, the only evidence must, commonly, be found in the *circumstances attending it*. And this character of evidence is ascertained by experience to be little, if any, less satisfactory than that which is known as direct or positive. Where the circumstances relied upon are properly established, and the inferences arising from each one, and from all of them combined, point naturally in one direction, there is no greater danger in following them to their conclusion, than attends all human investigation. That we may err in such cases is possible; but so we may where the evidence is direct or positive; the circumstances may possibly mislead, but so may the eyes, or the ears, or the dishonesty of witnesses.

As was said by Chief Justice Gibson in the case of the Commonwealth v. Harman, 4 Barr, 269: "The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts, by which, if true, the question of guilt or innocence is solved. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not, therefore, to stop its wheels. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief,—that is, actual disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear."

Now turning to the evidence, we find that on the 9th day of July last (1878), as John Hurford was passing Baer's Woods, on the Gap and Newport Turnpike in this county, he observed buzzards about it, and an unpleasant odor in the vicinity. Two days later, as Gainer P. Moore passed the same place, on his way to Cochranville, he observed buzzards there in large numbers, and a very offensive odor. When returning home he entered the woods to ascertain the cause of what he observed; and at the distance of about 65 feet from the turnpike discovered (in his own language) "something mysteriously hidden;" a small part of which was uncovered (doubtless by the birds), the balance concealed by means of leaves and a thin covering of earth, with the dead limbs of trees placed lengthwise over it. Obtaining the aid of Mr. Rhoades, who lives some distance away, he returned to the place with a shovel. Upon the earth

## UDDERZOOK'S CASE: CORPUS DELICTI.

being raised up at the left side of the body, a bloody shirt was uncovered. Next the head was raised, and the body ascertained to be that of a man. At this time, the witness says, the face was quite white, and natural; and he believes he could have recognized it, had he been acquainted with the individual in life. It was now about half past five o'clock in the evening. They left the grave in the condition described; and (after attempting to procure the aid of a man who drove by on the turnpike) went to Penningtonville, and notified the deputy coroner, Mr. Rambo. This gentleman, with several others, started for the place, and reached it, as they have said, about seven o'clock, being a little before sunset. Mr. Moore also returned soon after. The color of the skin had now changed and was quite dark — as you have heard it described. The deputy coroner had the covering removed from the other parts of the body, and it was then seen that the legs and arms were off. That part of the abdomen which was exposed when Mr. Moore first entered the woods, was open, the entrails had disappeared, a mass of semi-liquid corruption occupying their place. In another part of the woods, about 65 feet distant, the arms and legs were found, also under a slight covering of earth and leaves. The body, with the limbs, was removed to the turnpike, placed in a box, and then taken to Cochranville. At the woods, and at Cochranville, it was examined by Dr. Bailey (more critically, at the latter place), and he has described to you the marks he found upon it. He says there was an opening in the side, between the third and fourth ribs; another he thinks between the fifth and sixth ribs, another between the eighth and ninth, and that these openings were on a line; that he found another between the sixth and seventh ribs (further towards the back), and another at the lower part of the breastbone. How these openings or holes were made, the witness is unable to form any judgment, inasmuch as decomposition had probably changed their form when he saw them. He also found a small cut on the left side of the neck, about an inch above the collar-bone, not penetrating deeper than the skin; another incised, or cutting wound commencing on the left side of the neck under the ear, and on a line with it, running across the windpipe, opening it in two places. Also a small incised wound across the depression of the lower lip, not through the skin; and another wound across the bridge of the nose, breaking the bones, and depressing them, apparently made with a blunt instrument, about the thickness of a spade. He also found that the front teeth, four above, and four below, had been driven back into the mouth — two still adhering to the gum, and two lying loose upon the tongue.

Dr. Keeley testifies that he was present at an examination on the 16th, and that his observations of the body and the marks upon it agree substantially with those stated by Dr. Bailey.

Dr. Howard testifies that he made an examination on the 18th of July, refers to the wounds on the nose and the mouth, and says the

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blows by which they were inflicted must necessarily have been very severe.

Now were these the remains of one who had lost his life by violence?

The unusual place, and the unusual manner of interment; the mutilation by severance of the limbs, as if to prevent identification, and their separate concealment; the marks upon the body, and manifest evidence of violence about the neck, nose, and mouth; the bloody shirt found in the grave, all bear with great weight upon this question.

If you find that a murder or homicide of any grade was committed, you will next pass to the question: Who was the man so killed? The commonwealth says it was *Winfield Scott Goss*. Was it?

Winfield Scott Goss resided in the city of Baltimore, and its near vicinity, in the year 1871, and the early part of 1872. He was a brother-in-law of the prisoner. Mr. Barnitz, who knew him intimately, having been employed in the same establishment with him for some years, describes him as about five feet eight to nine inches in height, well built, with an exceedingly prominent bust, very erect, with shoulders thrown far back, his form full and in every way well developed, with dark eyes, a straight nose, round full face, dark brown hair a little mixed with gray, prominent forehead, and good teeth. Other witnesses similarly describe him, — Mr. Cator saying that his teeth were very fine.

He had procured insurance on his life, in several different companies, to a large amount, — the first policy bearing date the 21st day of May, 1868, and the last the 25th day of January, 1872.

On the night of the 2d of February, 1872, a frame shop, in which it is said he was engaged in gilding picture frames, and experimenting with a substitute for india rubber, was found to be on fire. After it was consumed, or nearly so, the charred and blackened remains of a man were discovered in the cinders, lying near the chimney — which was about the centre of the building. Goss was no more seen in the neighborhood; and on the 22d day of the same month in which the fire occurred, his wife made application to the insurance companies for payment of the sums insured on his life. This being refused, she commenced suits against them, the prisoner appearing as a witness in her behalf.

Were the remains found in the fire those of Goss? If they were, then of course those found in the woods could not be his.

That Goss went to the building sometime during the day preceding the fire is clear. Joseph Loudenslayer (the comments on whose testimony you will remember) says he saw Goss, in company with the prisoner, start on the afternoon of that day from the city, for this building; that they took with them a box four to five feet long, about fifteen inches in depth and width, containing as the prisoner alleged, machinery for Goss's laboratory. Lewis Engle testifies that the prisoner and Gottlieb



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Engle came to his father's house (a short distance from the shop), after dark, saying the lamp at the shop had gone out, and desiring another to take over; that they did not start back immediately, but (in the language of the witness) "stopped about the house after the lamp was ready;" and while still there, the prisoner went to the door to empty a tumbler or dipper, from which he had been drinking, saw the fire, and gave the alarm; that he, the witness, the prisoner and Gottlieb, ran over — the prisoner and Gottlieb falling a little behind; that when he reached the shop it was in flames, and not long after the roof and upper part fell in; that he saw no attempt to enter the building, or arrest the fire; that he heard no suggestion that any one might be inside, until the building was burned nearly down, when the prisoner came and requested him to go to Baltimore, and inform Goss's family of the fire, and that Goss was missing. Sarah Moore (the colored woman called by the defence) testifies that she was living at the time of the fire one hundred yards from the shop; that having occasion to go to her door, she saw Goss outside the shop, with a light in his hand; that it was dark, and she did not see him in front, but observed his side-face as he passed in, and heard him lock the door; that she then sat down to her supper, and soon after finishing it discovered the shop to be on fire.

Mr. Smith testifies that he reached the fire when the building was all in flames; that he heard Mr. Cator complaining to the prisoner for not giving the alarm before the fire had gotten so far, if he supposed anybody to be within the building, asking him if he desired to create a false alarm by saying that Goss's body was in the flames, and that the prisoner replied he was unacquainted with anybody about the place.

The witness says he then went nearer the fire, and procuring the assistance of Martin Quinn, found a body, and succeeded in dragging it out of the flames; seeing the prisoner again in the crowd he asked him if he was going to leave the corpse there like that of a dog, while claiming it to be the remains of his brother, upon which the prisoner turned his back and made a noise as if crying. The corpse was then placed in a box, and taken to Mr. Lowndes's stable, where it was left for the night. The next morning, this witness says, he went to the scene of the fire as early as it was light enough to see, and sought among the ashes for Goss's watch and ring, finding nothing but a melted bottle, part of the door hinge, and a few small bones.

From the body the hands and feet were off; the skin was burned crisp, and blackened; identification by means of the features and expression was impossible. Mrs. Goss testified that the corpse was brought home in the evening of the day following the fire; that she identified it as that of her husband. She says, however, she judged only by the size and shape of the head, the neck, and body; that in

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these respects it resembled him. This, it must be observed, falls short of identification — which can only result from observing some mark by which the individual may be known, or the peculiar expression formed by the features of the face. Mr. Arden, the step-father of Mrs. Goss, who saw the corpse, also testifies that he observed the same resemblance to Goss in the head, neck, and body. Mrs. Arden, the mother of Mrs. Goss, says the body could not be recognized, by reason of its condition, but that the shape of the head and body resembled those of Goss. Mr. Smith, before referred to, says the body when taken from the fire by him was not susceptible of recognition; but that, for the reasons which he states, the thought occurred to his mind that it was the body of a female. Dr. Howard, however, dispels this suspicion. He testifies that about one year after the fire he made a careful examination of this body and found it to be that of a man, of about five feet eight to ten inches in height, with full chest, and shoulders thrown back.

This witness further says, that upon a critical examination of the mouth, he found that one half the teeth had been lost many months, at least, before death — two of them directly in front, one being from the upper and the other from the lower jaw. This latter statement is important when considered in connection with that of the witnesses who have described Goss's teeth as regular and fine.

On the day preceding the fire it is testified that Goss drew out of bank the balance standing in his favor, and his account there closed.

We now repeat the question: Was this his body found in the fire? If the inquiry stopped here it might be unsafe to conclude that it was *not*. But it does not stop here; there is other evidence bearing upon the question, of a highly important character. On the 22d day of June following the fire, and while the suits referred to were pending, a man presented himself at the house of David Mullin, in Coopertown, asking to remain as a boarder, and giving his name as A. C. Wilson. Mr. Mullin says he remained until the 16th day of the next November, when he left for Athensville, about two miles distant. Here he remained one week, and then left, appearing at Mrs. Toombs's boarding-house, in Newark, on November 29th, where he remained nearly seven months. The witnesses who saw this man at Coopertown and in Newark describe him as stoutly built, five feet eight to nine inches in height, full chested, shoulders thrown back, with dark brown hair a little mixed with gray, good teeth, full broad forehead, and having when in Newark, moustache and side whiskers. The witnesses do not all precisely agree in describing his features, but unite as regards his general appearance, and in saying that his face was fine.

Several witnesses also state that he had a habit of drinking to excess, as Goss is said to have had.

These witnesses further testify that he carried on some correspondence with Baltimore, where Goss had resided — sending letters and packages, and receiving others in return. One witness, Michael Olrey, being acquainted in Baltimore, testified that he conversed with Wilson about mutual acquaintances residing there.

It is clear he knew the prisoner, for he received a visit from him while at Newark.

A pair of pantaloons, which several witnesses recognize as Wilson's — left behind when quitting Newark — have been exhibited. They are darned in the seat, and are thus identified. Mrs. Toombs says she noticed that they were very short for him. Lewis Engle testifies that when Goss boarded in his father's family, near Baltimore, during the summer or fall preceding the fire, he had such a pair of pantaloons as those exhibited: says he, the witness, assisted Mrs. Goss to wash them, that he noticed the color, the cord on the side of the leg, and also observed that they were short for Goss when worn.

It is further shown that this man wore a large blood-stone ring, such, in general appearance, as the one exhibited here. Some of the witnesses testify that they *recognize* this as the same. Engle testifies that Goss had a similar ring, being in all respects like this; that he, the witness, wore it sometimes, and that he believed this to be the same; while Mrs. Goss, who describes her husband's ring as being of about the same size and of the same general appearance as this, says it was, according to her recollection, in some respects different. Whether it is possible for any of the witnesses to recognize the ring fully, so as to swear to its identity, is for you to determine. It would seem to the court safer to conclude that the ring worn by Goss at Engle's, and that seen on the man known as Wilson, were alike in size, shape, material, and general appearance.

A frock coat is produced which Mrs. Toombs identifies as a coat worn by Wilson, and left behind when quitting her house. On this coat being exhibited to Mr. Heins, a tailor residing in Baltimore, he testifies that he made one in all respects like it, being of precisely the same measure, for Goss; that while he cannot describe to you how he recognizes his own work upon this coat, he tells you that he believes he does.

It is shown by several witnesses that Goss, while in Baltimore, had in his possession what is called a double ratchet screw-driver, very peculiar in its construction, and claimed to be his own invention. It is further shown that the man calling himself Wilson had a wooden model of this same screw-driver, which he claimed to have invented.

Lewis Engle testifies that when Goss boarded at their house, near Baltimore, he saw him and Udderzook a good deal together, and that Goss frequently called Udderzook "*Doctor*." Several of the witnesses who saw Udderzook and the man called Wilson together at Newark,

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testify that Wilson called Uddersook "*Doe*." The significance of the last two mentioned circumstances cannot be overlooked.

And now, following this evidence, designated to show similarity, in person and apparel, in the habit of intemperance, possession of the screw-driver, and in the appellation or title used when addressing Uddersook, the commonwealth has undertaken to prove the actual identity of Wilson as Goss, by exhibiting the photograph of Goss to the witnesses who were familiar with Wilson, some of them having been his room mates in the boarding-house. Were it possible to produce Goss himself before these witnesses, as he appeared in life, they could tell us, doubtless, whether he is the same man who was known to them as *Wilson*; and their judgment should be the highest and best source of information on the subject. As Goss cannot be so produced, probably the next best means of judging of his identity with Wilson is obtained by producing his photograph (if it be a perfect one), and allowing these witnesses, who were familiar with Wilson, to base their judgment on it. The picture is of course a much less satisfactory means of judging than the presence of the individual would be; because it shows the face in a state of repose, not very frequently observed in the individual; and showing it on a much smaller scale, the expression is less distinct. Still, where a photograph is perfect, it shows an exact likeness to the extent presented, and can generally be recognized with great ease by those familiarly acquainted with the individual. The photograph exhibited here is shown to be that of *Goss*. Some of the witnesses who knew the man called Wilson, say this *looks like him*; that the shape of the forehead and face is like his, but they do not *recognize* the picture. Their testimony must not be over-estimated. It goes no farther than to show resemblance. Other witnesses, more familiar with this man, particularly some of those who boarded in the same house with him, say they *recognize* Wilson in the picture; one saying he "sees the man in it," others, "it is him," and so on, in varied language expressing the same thought.

Too much importance should not be attached to the fact that these witnesses were not able to point out any particular feature by which they recognize the picture as his. If asked to point out the feature or features by which your most intimate friend is distinguished from others, you probably could not do it. Were you to refer to the size of his head, shape of his face, nose, or mouth, you would doubtless find that in all these respects he is not singular. But you recognize him instantly, and with absolute certainty, by his peculiar expression, the combined effect of all his features and his mind. And this you cannot describe, for words will not do it.

In determining the weight to be attached to the testimony of the witnesses, who say they recognize Wilson in the picture, or recognize the

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picture as his, it is important to remember that when they knew him his beard was different. What effect the change of beard would have on the expression and appearance of the picture, you will judge. You will also bear in mind the comments of the defendant's counsel on this testimony, and the fact that the prisoner's sister, who saw Wilson at Mr. Mullin's, says she does not see any likeness to him in this photograph.

The commonwealth has further undertaken to show that Goss and this man wrote, not only a similar hand, but the *same*. In this connection Emma Taylor testifies to the receipt of many letters or notes from Wilson, and a knowledge of his handwriting. Two letters—one of them addressed to Mr. Mullins signed *A. C. Wilson*—being exhibited to her, she says, in her judgment, they are his handwriting. On being shown another letter signed *W. S. Goss*, and testified by Mr. Butler (as he believes) to be in Goss's handwriting, she says, in her judgment, this is the handwriting of Wilson. This witness, however, as you will remember, did not exhibit such accurate knowledge of Wilson's handwriting as to render her judgment in regard to it very reliable; and what she says should therefore be received with great caution.

John W. Butler testifies that he knew Goss intimately, and corresponded with him some years ago; that he knew his handwriting very well, and believes himself able to recognize it. The letter signed *W. S. Goss* (before mentioned) being shown him, he answered, "I believe this to be Goss's handwriting." The two letter signed *A. C. Wilson* (also before mentioned) being shown this witness, he answered that the writing, in his judgment, was that of *Goss*. The signature of *A. C. Wilson*, on the register of the Central Hotel in Philadelphia, under date of —, being shown the witness, he answered that he would take this to be written by *Goss*, as also the signature on the register of the William Penn Hotel, though in respect to these single signatures his judgment is less distinct than that expressed in regard to the letters. The intelligence manifested by this witness, as well as the caution observed in expressing his judgment, should be considered in estimating the value of his testimony.

Franklin Mills testified that he knew the man called Wilson, and upon one occasion, when sitting at his side, discovered a small scar running up into his hair on the side of his forehead—that he had never noticed it before. Mrs. Goss testified that her husband had no scar upon him. You have heard the comments of counsel in respect to this, and will determine what weight the contradiction should have,—but in doing so will remember that Mr. Mills speaks of the man more than a year after Mrs. Goss had last seen her husband.

Now was this man, called Wilson at Coopertown and Newark, Winfield Scott Goss, under an assumed name?

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If he was, you will judge whether the conclusion is not reasonable that he had entered into a scheme to obtain money fraudulently from the insurance companies; and that the burning of his shop was a part of this scheme. If you reach this conclusion, a reason will be found for his appearance in Pennsylvania and New Jersey under an assumed name. Still if you find this man was Goss under an assumed name, you will have made but a step towards finding that the remains discovered in the woods were his.

But now (if this was Goss) we find him in Newark on the evening of the 25th day of June, sixteen days preceding the discovery in the woods. He then started for Philadelphia. Mrs. Toombs testifies that three days later, he wrote to her from Philadelphia, under date of the 28th. Francis Jacobs testifies that he is clerk and bar tender at the William Penn Hotel, in Philadelphia; that in the forenoon of the 26th (the day after this man left Mrs. Toombs) a man came to the hotel, representing himself to be A. C. Wilson, and registering this as his name. The witness describes him, and being shown the photograph exhibited here, says it looks like this man. He is unable to describe any other stranger who called about that time or since, and says he did not recognize the resemblance in the photograph until told whose it was. You will judge whether this witness can truly describe the man as he undertakes to do, and whether he does see the resemblance in the picture to which he testifies. That a man came to the hotel representing himself to be A. C. Wilson, that the witness saw him register his name, that he stayed till the next day, that the prisoner visited him, occupying the same room, and went away with him, the witness is positive. The register is produced, and the name of A. C. Wilson appears upon it; and this signature, as we have seen, Mr. Butler expressed the judgment is in the handwriting of Goss. If the witness is believed, it was on the morning of the 27th that the prisoner and this man left the William Penn. Where they went at that time does not appear.

On the evening of the following day, the prisoner was seen upon the train at Wilmington, by Mr. Hodgson, who rode with him to Philadelphia. (We do not observe any conflict between the testimony of Mr. Hodgson and that of Mr. Jacobs, because we do not see any inconsistency between the facts to which they speak.) Two days later, Francis Pyle, who lives near West Grove, in this county, testifies that the prisoner, in company with another man, came to his place. He says he had known the prisoner formerly, and recognized him. Mrs. Pyle and the little boy Elmer Pyle, also saw the men there, and say they recognize the prisoner as one of them. Mr. Pyle and the boy describe the appearance and parts of the dress of the other, referring to his build, his whiskers and moustache. Mrs. Pyle saw but little of him and was not very near. Mr.

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Pyle says he wore gaiters like those shown here, and had a ring on his finger. Upon being shown the photograph, he says it looks like a picture of this man. The son also, in addition to the general description, says this man wore gaiters; had eye-glasses, and that when they were together under the cherry-tree, he called the prisoner "Doctor." This last circumstance, if true, is very significant, for as we have seen (if the witnesses are believed), this is the same appellation by which Goss in Baltimore, and the man calling himself Wilson in Newark, addressed Udderzook.

From Mr. Pyle's place these men went in the direction of Jennerville. In the evening of the same day, Mr. Jefferis, Mrs. Jefferis, and Mr. Townley, testify that the prisoner, with another man, appeared at the hotel of Mr. Jefferis, in Jennerville. These witnesses recognize the prisoner, as does also Mr. Wallace, who saw him there, and had known him before. They describe the other man as about five feet eight to nine inches in height, good-looking, full-breasted, straight, with shoulders thrown back, moustache and side whiskers of a dark color; Mrs. Jefferis saying that she, at the time, thought he was the straightest man she had ever seen. On being shown the photograph before referred to, these witnesses also say the picture resembles this man. The next morning, being the first of June, it is shown (if the testimony is believed) that the prisoner obtained a horse of Mr. Patchell living near by, and visited his brother-in-law, Samuel Rhoades, who resides a short distance from Penningtonville.

Here he was recognized by Mr. Rhoades and his wife, who is the prisoner's sister. They testify that he spoke of the man he had left behind at Jennerville, and Mr. Rhoades says he described him as a man "having no one to look after him, who had been lost for a long time, and was supposed by everybody to be dead, one whom the prisoner had had at Newark or New York (the sound being so much alike that the witness is not certain which), and Philadelphia." The bearing of this description upon the identity of the man left behind is most important. You will judge whether it does or does not describe Goss, and the man known at Newark as Wilson, with great certainty: "Lost for a long time, supposed by everybody to be dead, whom he (the prisoner) had had at Newark or New York, and Philadelphia."

On the evening of the same day, the prisoner having hired a carriage and horse at Penningtonville, went to Jennerville, took the man he had left there in, and started back. When he reached Penningtonville in the night this man was gone, and was no more seen alive. Baer's Woods is by the roadside. Were the remains found there his? The last time seen he was going in that direction. If Mr. Rhoades is believed, the prisoner had *contemplated* leaving him in the woods somewhere.

When the remains were first uncovered, Mr. Moore testifies that the face was white and natural; says he looked to ascertain whether he could

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identify it, and believed at the time, and does still, that he could if he had known it. On being shown the picture before referred to, he says it bears a resemblance to that face. This, standing alone, would be of no value, because of its uncertainty. But Mr. Moore and others who saw the remains that evening and the next day, say the upper lip presented the same appearance as the cheeks did where the whiskers came off, on being touched, showing that the man had worn a moustache with side whiskers; that his hair was dark brown, mixed a little with gray; and Dr. Howard, as well as all the witnesses who examined the remains with care, says the forehead was square and straight, the face fine, chest full, shoulders well thrown back, the person very erect, and teeth regular and good. You will judge whether this is or not an accurate description of the man we have been following.

In the same grave a shirt was found. It is not identified, for there are no marks upon it by which to distinguish it from others. There are many such, as Mr. Crockett testifies, but this witness says he sold a shirt in all respects like this in Newark to a man called Wilson, as he was informed; and Mrs. Toombs testifies that Wilson had such a shirt, showing another point of resemblance.

Then again a pair of Congress gaiters were found upon the feet resembling those worn by the man we have been following. But a more remarkable and striking resemblance still is found in the fact that this man's gaiters were marked No. 8, on the inside, near the top (if Mrs. Toombs is believed, of which you will judge), and had recently (as Mr. Saurin testifies) been half-soled; and that the gaiters found on these remains exhibit a similar number, in the same place, and a similar condition in respect to the soles.

Now you will determine whether these are the remains of the man we have been following. If they are, and this man was *Goss*, then did the prisoner take his life?

In starting upon this inquiry the first thought that presents itself is, had the prisoner any motive to commit the crime?

If the remains are those of *Goss*, you will judge, as before remarked, whether he had not entered into a scheme to defraud the insurance companies, by hiding himself from the world, and endeavoring to create the belief that he was dead. And if he had entered into such a scheme, you will further judge whether the conclusion is or is not reasonable that prisoner had also entered into it. For it would follow that while *Goss* was thus alive under an assumed name, and while the prisoner knew this, for (according to the testimony as we have seen) he visited him at Newark on the 11th of May, he appeared as a witness on the 28th day of the same month to prove his death, not, it is true, by swearing directly that he was dead, but by swearing to circumstances from which he sought to



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create that impression. If it is true that the prisoner had united in such a scheme, it was very important to him that the existence of Goss should not come to light; for if it did, not only would the scheme fail, but the prisoner become liable to prosecution for conspiracy and perjury. And if you find such motive for the concealment of Goss existed, you will judge whether his disappearance from the neighborhood in which he was known, and his reported death, did not invite to the commission of the crime here charged, by reason of the immunity from discovery which these circumstances tended to afford.

Still a motive to commit the crime, and such opportunity to gratify it, would be of no consequence, in the absence of evidence that the prisoner did commit it. Then what is the evidence that he did?

If the remains found in the woods are those of the man we have been following, and that man was *Goss*, then we have found the prisoner and Goss together on the first day of July. On the evening of this day, as we have seen, the prisoner visited his brother-in-law, Samuel Rhoades, whose testimony I will now turn to and read: "The prisoner came down to where I was at work between one and two o'clock; he said it was warm; he had written me a letter, and as soon as I saw him I thought of the letter; as soon as I saw him I asked him about that letter; after he spoke to me, I said I wrote back in answer to his letter to know what it was, and that I got no answer. No, he said, I couldn't write any more, and it had to be by word of mouth; however, he says, it is just as good now, and better, if anything; he says it is a sure thing for a \$1,000 apiece. He then said, it is warm, let us go up to the shade; we walked up and sat down along the edge of the field in the shade, and I asked him what it was; he says, have you got a horse? I said yes; he says, have you got a wagon that will hold three? I said yes; I believe I said I had no carriage, but I could get one; I asked him when we would get the money, he spoke and wrote of; he says we will get \$500 apiece, right away; he said there was more money we would get; he began to say something about it and stopped; he said he would guarantee me \$1,000 anyhow; I asked him what it was; he said it was a man that was drinking and spending his money for no good; he said he had the "poker" two or three times since he had been with him; he said he had about \$1,000 with him, he was certain, for he had been drawing his money through him; he wanted me to hitch up and go right with him to Jennerville, and get this man in and take him to the woods; and he would give him a little laudanum, and put him to sleep and take his money. Says I, I can't go on that; I told him if he commenced that he would ruin himself and his whole family; he said there is not a bit of danger; he had had this man, he said, to New York or Newark (am not certain which, they sound so much alike), and to Philadelphia; and I wouldn't go to all that trouble unless I knew what I was doing; I told

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him nobody knew what they were doing when they began that kind of business ; I told him he would have to give up the idea ; he says, I will not go home until I get it ; he says, I will do the stealing, and spoke as though he wanted me to hide the money ; he said if I wouldn't have anything to do with it, as he had been at a great trouble and expense, he would do it himself and bury the money ; I told him not to, and that I must go to work ; I told him to stay a day or two and I could talk to him in the evening, and in the morning, until the hay was fit to work ; he said the man would not stay at Jennerville by himself, and if he (Udderzook) stayed he would have to bring the man up, and asked me if he might ; I told him he should ; he then asked me for my horse to bring the man up ; I told him I could not give him my horse, as he was at Warner's ; he asked if there was a livery stable at Penningtonville ; I told him there was, and he could get a team there ; he says, the man is very sick ; he said he thought he would have died last night, or the other night, I don't know which ; that he doosed him with whiskey ; he says, I believe he will die, and how would it be with you and Annie if he should die at your place ? would you allow me to put him away, and say nothing about it ? I said no, if a stranger would die at my place there would have to be a coroner got, and an inquest held ; he said there was nobody to look after this man ; he said he had been lost for a long time, and everybody thought he was dead ; he had no friend that would look after him, or care anything about him ; I told him it didn't make any difference ; if a stranger died there, there would have to be an inquest ; he threw his head down, his cheek appeared to get red, and he said, that might lead to some suspicion ; I told him I couldn't help it, I couldn't have anything of that kind ; he says, well what then ? I told him I could not tell him any more until I saw the man ; he started off towards Penningtonville with my wife."

This witness and his testimony have been criticised by counsel, and you will determine what weight his statements should receive. In this connection it is important to remember that he exhibited the prisoner's letter, referred to, soon after it was received, and reported to his neighbors the interview, detailed here, almost immediately upon its occurrence. You will also remember the testimony heard respecting his character for truth-telling ; and will examine the prisoner's letter, to see whether it does or does not corroborate his statements. That letter appears by the envelope to have been forwarded in the preceding December, and Mr. Rhoades testifies that it was received at that time. It is in the following words : —

"FRIEND SAM: I have something of importance that must be done by word of mouth. Please don't let anyone know of our communica-

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tions, but as soon as you read this mount your horse and come to Oxford, take the morning train to Baltimore. When you come to Baltimore, inquire for Decker & Brothers' planing and saw-mill. This mill is right across the street from where you get out of the cars. I am employed in the said mill and am there every day. You will arrive at one o'clock; you must take the next train for Oxford, which is at 2.30, that will give us one hour and a half, which will be sufficient for us to arrange one of the finest plans that you have heard of. There is a cool \$1,000 in it, and there is nothing to prevent us from getting it. This is without a DOUBT. Do not buy your ticket at Oxford, but pay your fare on the car. Do not let a soul know where you go. I cannot explain further until I see you. *Do not fail to come.* Drop everything at once. You can make the trip in a few hours. I have no person in confidence with me, and I now propose to take you; you will find that it is the best day's work that you ever did. I will give you full explanation when I see you. (Bring the letter with you.) Your expenses will only be \$4.00 or a little less.

"Very respectfully,

WM. E. UDDERZOOK.

"Be firm, be true."

On the evening of the same day, after the interview with Rhoades, as night was coming on, the prisoner started, with the man by his side, in the direction of Penningtonville. Baer's Woods is about nine miles from the place of starting, and in this direction the parties were going when last seen. John Hurley, who lives within a short distance of the woods, testifies that his wife in the night aroused him to hear a noise in that direction. That he distinctly heard hallooing, and distinguished the voices of two individuals, but could not distinguish any expression except the exclamation "Oh!" That about daylight the following morning he discovered smoke arising from a fire in the woods. And several other witnesses testify to having seen fire in the woods on that morning.

It is further shown that about twelve o'clock the same night, the prisoner returned the vehicle to the stable at Penningtonville. The iron supporting the dasher on the left side, where the man was sitting when last seen, was broken, and the leather bent forward; two of the bows supporting the top, on the same side, were broken from the bed, and swinging loose. The oil-cloth that had covered the floor was torn out and gone; the blanket and sheet that accompanied the wagon were missing. What had become of them? Had they been stained with blood and consumed in the fire? After the discovery of the body the floor of the wagon was examined, and red spots, apparently made by blood, were observable on the edges of the boards forming the bottom, and underneath where it appeared to have spread. Dr. Howard testifies

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that having applied microscopic and analytical tests to these spots, he ascertained them to be made by blood.

Now, if the remains found in the woods are those of the man who started with the prisoner from Jennerville, you will judge whether the prisoner did or did not carry out the design which Rhoades says he expressed in the interview, a few hours previous; whether the hallooing testified to by Hurley as heard that night did not come from this man; and whether the smoke seen did not issue from a fire that consumed the bloody garments (as well of the perpetrator as of the victim), and other evidences of the crime.

Where the prisoner spent the balance of the night after returning the vehicle does not appear. He was seen early the next morning entering Cochranville on foot. Later in the day he was met, still on foot, going in the direction of Jennerville. On the evening of the same day, about six o'clock, he appeared at Penn Station, on the Philadelphia and Baltimore Central Railroad, where he took the train East, getting off again at West Grove — this being the point at which he and his former companion had (according to his own statement) left the train two days before. In a short time he reappeared, carrying a carpet-bag and valise, and entered the train going westward. At Penn Station he left it, and passed in the direction of Mr. Miller's, where his mother resided. On the next day — being the third of July — he took the train for Baltimore.

When arrested he made a statement which you have heard; and you will judge whether it is consistent with probabilities, or finds countenance in any ascertained fact in the cause.

We now repeat the questions before stated: First, were the remains found in Baer's Woods those of Winfield Scott Goss? Second (if they were), did the prisoner at the bar take his, Goss's life? Both these questions must be found against the prisoner before he can be convicted. In passing upon them, you will carefully weigh all the evidence, as well as the comments of counsel upon it; and will also consider the testimony which the prisoner has produced in regard to his former character.

If you convict him you must determine the *grade* of his crime. That it is *murder*, if he is guilty at all, has not been questioned by his counsel. But in Pennsylvania the legislature, considering the difference in guilt where a deliberate intention to kill exists, and where no such intention appears, has distinguished murder into two degrees — murder of the *first*, and murder of the *second* degree; and required the jury trying the accused, if it finds him guilty, to ascertain and find by their verdict whether it be murder of the first, or murder of the second degree. So it is further provided that "murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, shall be deemed murder in the first

degree; and all other kinds of murder shall be deemed murder of the second degree."

Then if the defendant is guilty, is it of murder of the *first*, or murder of the *second* degree?

If the prisoner killed Goss, you will determine whether it is not plain that the crime was contemplated beforehand, and the killing wilful and deliberate. The circumstances bearing upon this question have been so fully stated, in treating other parts of the cause, and must be so distinctly present in your minds, that we need not repeat them here.

Still this question is for you alone to determine, and if you convict the prisoner you must say whether it is of murder in the first or second degree.

In conclusion, we urge upon you to bear constantly in mind the great importance of the cause. To the prisoner it involves everything of earthly desire. You will therefore give to the facts not only their most reasonable construction, but also their most charitable and merciful construction; and if, when thus considered, they fail to satisfy you of his guilt, you will acquit him, regardless of all consequences. And he is entitled to the benefit of every doubt. A doubt, however, is not a mere *possibility* that the prisoner may not be guilty, but an honest hesitation of the mind arising from the proof.

If on the other hand the facts satisfy you of his guilt, you must convict him. In such case no consideration of pity or mercy can influence you. To the tender appeal made by the presence of wife and children, you must turn a deaf ear. To listen to it would be more than a mistake; it would be a crime—a crime against the innocent, against society. With the consequence which may attend conviction, you have nothing to do; they rest upon others. If the evidence *satisfies* your minds of his guilt, you have no choice. Following the pathway of the evidence, you can turn neither to the right nor to the left, but must accept the conclusion to which the facts lead. If you entertain views unfavorable to capital punishment, you must disregard them here, remembering that it is not the jury, but the law, that inflicts the punishment. The jury does not pronounce the sentence which condemns to death; it simply determines whether the prisoner has committed the crime.

You will now take the case, and forgetting everything but the law, the evidence, and your duty, will pass an honest, deliberate, and fearless judgment between the commonwealth and the prisoner.

The defendant was convicted of murder in the first degree. The conviction was affirmed on error by the supreme court of the state, and the defendant was subsequently hung. The opinion of the supreme court is given, *supra*, § 708.

APPENDIX.

No. VI.

COMMONWEALTH v. STURTEVANT.

*Supreme Court of Massachusetts, 1874.*

[Before Judges WELLS and AMES.]

(See *supra*, § 688, 684, 685, 703, 705.)

In this case, which has been several times noticed in the text, the charge to the jury was given by Wells, J., of the supreme court. For the stenographic notes from which the following is taken the editor is indebted to Mr. Train, the attorney general of the commonwealth :—

MR. FOREMAN AND GENTLEMEN OF THE JURY: I congratulate you upon the near approach of the close of this long trial, and there remains but a small duty for me to perform in this case, because there are but few questions which the court are to deal with. It is mainly a simple question of fact. The court is to deal only with the law and its application to the facts; the counsel deal with the facts and argue them to you; and the case has been so conducted throughout, from the beginning of the trial, by the counsel upon both sides, with that conscientious regard to their duty, with that appreciation of the principles of law which apply to the case, that the court have had little to do but sit by and see the trial proceed; and so, in this last stage of it, the argument has been conducted so fairly upon both sides, with such a correct appreciation of the bearing of the law upon the facts, that there is still in this branch of the case but little left for the court. The court, as I say, is to deal only with the law, in its application to the facts and arguments which have been presented, and is not to deal with the facts or the evidence except so far as to see that the law is rightly applied to the evidence.

It is indeed a responsible office, that which you are to perform, and have been performing through the week in regard to this case. It is a responsibility which you share with the court, with the counsel upon both sides, with the officers, and with the witnesses. None of us are responsible for the results, none of us are responsible for what may happen as the consequence of our proceeding; all of us are responsible that we do that part of it which falls to our lot faithfully, conscientiously, intelligently, and according to real convictions of duty; and when we have done that, there is nothing which can attach to us of responsibility beyond. And your duty, gentlemen, is to have listened carefully to the testimony which has been produced before you; to have made that use of your minds which it is the duty of every intelligent man to make of that intellect and judgment with which he is endowed; to see that you are free in your minds from every influence that shall warp your judgment,

## STURTEVANT'S CASE : CIRCUMSTANTIAL EVIDENCE.

which shall lead you to give undue weight to evidence, or to reject evidence which ought to be considered ; to free your minds from every disturbing influence, whether of fear, of anxiety, of passion, or of prejudice or bias or undue scruple as to the results, whether to the prisoner or to the community ; to free your minds from all considerations of this sort, so that they will, like a magnet upon its pivot, answer to the influence which every fact presented to you shall have upon them, to attract them towards, or repel them from, their conclusions. But when you have taken all the facts in the case, and dealt with them fairly and honestly, as your minds deal with all facts which come before you in the course of your life ; when you have let your mind respond, of its own instincts and impulses, to the weight of those facts, if you find that there results in your minds a conviction of the truth of the main proposition in the case, one way or the other, then your duty remains to declare that result in your minds, without regard to any further consequences.

The charge here is, that this prisoner is guilty of the murder of Simon Sturtevant. The indictment is a charge of murder, but upon an indictment for murder, where there has been a homicide, if the evidence warrants it, there may be a conviction either of murder or manslaughter. Manslaughter is a homicide, not excusable, not justifiable, but yet not intentional ; a homicide which results from wrong conduct, but not from the cool intent to kill ; from misbehavior, from misconduct which results differently from what the party had reason to expect from the act which was done. A murder is a homicide which has been caused intentionally — intentionally, either from the express purpose to commit the murder, or from a wrongful act of violence, with such means and in such a manner as might reasonably be supposed would cause death. There must be in murder what is called "malice ;" namely, either a purpose to kill or else a purpose to do an act of violence which might reasonably be supposed would cause death, and which does cause death.

If you find that there has been a murder in this case, it will be necessary for you to go further, and ascertain whether it is murder in the first or second degree. The description in the indictment is the same for either, but the statute provides that murder committed with deliberate, premeditated malice aforethought, or in the commission or attempt to commit any crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree. You will perceive by the repetition of the language which indicates forethought, that it is the intent of the statute to make murder in the first degree only of those cases where the murder is of such a character as to show a deliberate purpose. But deliberation does not require any considerable length of time. The mind deliberates rapidly, some-

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times instantaneously, going from its premises to its conclusions in an instant of time; so that a deliberately premeditated murder with malice aforethought may result from an intent to kill which the mind conceived the instant before the weapon was taken or the blow struck. All the circumstances of the transaction are to be taken into consideration, in order to determine whether it be of this character or not; and upon this question it is competent for you to consider, not only the fact of the dangerous character of the weapon which was used, if you find that such a weapon was used, but it is also competent for you to consider the other occurrences which seem to have taken place at or about the same time. In this connection, as bearing upon the question whether the person who killed Simeon Sturtevant did so with deliberately premeditated malice aforethought, you may take into consideration the fact, if you find it to be a fact, that he also killed, at the same time or about the same time, the other two persons. The evidence that the weapon was deliberately taken and brought there for the purpose would be sufficient to warrant you in finding that it was deliberately premeditated, so as to make it murder in the first degree.

So, also, if you are satisfied that this homicide was committed in the attempt to commit the crime of robbery by entering that house, or being in the house by entering any of its rooms against the will of the owner, the rooms not being open, then, whatever may have been the purpose of the individual who went there originally, if this homicide was the result of an attempt to commit such a robbery, it is, by the express declaration of the statute, murder in the first degree.

If, therefore, you find that this weapon was taken there for the purpose of being used in the homicide, or if you find that the person who committed the homicide did it in the attempt to commit a robbery and in the execution of the purpose of robbery, then you must find him guilty of murder in the first degree.

But the main question, as I suggested, is one of fact, not as to the character of the offence committed, because there is no serious controversy here that this was such a murder as would be murder in the first degree. Nevertheless it is for you to find what is the fact, and the law requires that you should find it, and state it in your verdict. If you find a criminal homicide, you will say whether it be manslaughter or murder, and if murder, whether in the first or second degree. But the principal question is, did this person, who is now arraigned before you, commit the act which resulted in the death of Simeon Sturtevant? The whole case, as has been suggested to you, rests upon circumstantial evidence. It is necessary, therefore, to consider somewhat the character of that kind of evidence.

Of course where a person kills another, the most direct evidence as to



#### STURTEVANT'S CASE: CIRCUMSTANTIAL EVIDENCE.

the perpetrator of the assault is, by the very act of killing, destroyed. Here the three persons who were the occupants of the house were killed. The direct evidence, therefore, is put beyond reach, and necessarily circumstantial evidence must be resorted to. It may be that the purpose of the killing was merely to put the evidence beyond reach; it may be that it was merely as a means of reaching the object in view — to secure booty. Whatever it may be, the direct evidence has disappeared, and you are left, therefore, to circumstantial evidence. The closing remarks of the government attorney, which adopted language which had been used by the court in similar proceedings to this, so far as I could see, were not open to any exception. He has stated substantially what the nature of circumstantial evidence is. It is indicated by the very term itself. Circumstantial evidence is the evidence from facts which stand around the main fact to be proved. Direct evidence is evidence pointed directly to the establishment of the fact. Direct evidence, as has been stated, is evidence from the sight, or some of the senses, of the very fact in controversy; but when such evidence is gone, we resort, in capital trials, as in all the business of life, to what is called circumstantial evidence; that is we resort to those inferences which the mind draws from surrounding circumstances, and it is stronger or weaker according to the nature of those circumstances — their nearness in relation to the fact to be established, and their concurrence with each other towards one and the same conclusion. If you find all the facts which are developed in regard to a transaction or in regard to a person to indicate one line of results, then you draw from those facts an inference as to other facts which are not brought to your vision, and not brought to your actual knowledge.

Perhaps I may illustrate by some of the evidence in the present case substantially what I would have you understand as to the bearing of evidence which is in its nature circumstantial. Take, for instance, the evidence as to the weapon which killed Simeon Sturtevant. There was no weapon found in the room; there is nothing by which the precise shape and size and form of the instrument can be gathered in the wounds which he received, except that it was not a sharp instrument, — that it was some blunt, smooth, but heavy, solid instrument. Now, you find the three persons killed with similar wounds; you find this club lying near one of them; you find blood upon that club; you find no other instrument anywhere about the premises which appears to have been used for such a purpose, or which appears not to be in its own proper place. You put together all these surrounding circumstances. You may, for instance, consider that there were marks upon the ceiling of the porch or kitchen, and upon the casing of the door, which indicated that they might have been produced by such a club. You may take into consid-

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eration the fact, if you believe that it is so, that there were particles of plaster on the point of the club, and also in the indentations upon the casing of the door. You may take into consideration the character of the club, and the description of the wound, as indicating whether or not the wound was such as would be likely to be produced by such an instrument. You may take into consideration the position of the various persons who were injured and the direction of the wounds. You may take into consideration, also, the fact that a piece of bone was found in the club. Now you will see that no one of these facts proves directly that that club was used in killing Simeon Sturtevant, but as circumstantial evidence, they have strong tendency in that direction, from which you may infer, and perhaps you will infer, as beyond all question, that that club was used in the killing of Simeon Sturtevant. If you come to the conclusion, that that club killed Simeon Sturtevant, that then becomes a new fact in the case, which your minds may take as a fact, from which other inferences may be deduced, if other facts concur with it, to aid you in making such other inferences. But the fact alone that that club, which was found in the field, was the club which killed Simeon Sturtevant, does not help you at all, so far as tracing anything to this defendant is concerned. It helps you to come to the conclusion what the instrument was which killed Simeon Sturtevant, and that is all; so that in order to ascertain anything in the direction of the person who committed the act, you desire to find other circumstances to put with this, and see whether they point in any particular direction; and each new circumstance adds a new point by which the field of investigation is narrowed, so that by getting a great many points you may bring it down to a small compass, and say, "The fact we are seeking lies here, within this narrow compass, and therefore our investigations in that compass will probably lead us, if we can get all the facts, to the right person, although they do not separately indicate who that person is."

You will see that the officers act upon this idea. They find that the club corresponds to a place in a cart from which a stake is absent, and it fits that place. You would draw the inference from this, that it was taken from that place. It is not a necessary inference. It is aided by the further evidence of Mr. Jefferson, who knows something about the cart, and who says, from indications which he finds, and which he has described to you, that he cut that stake on the third of January and put it in that cart, and that it was there when he last left it at Mrs. Josaleyn's house, as I understand it; but the precise period when he last saw it is not in evidence. You, therefore, get one point further towards your destination, but you have not yet got anything that touches anyone in particular; you have only narrowed the ground, given some direction to the inquiry which should result in finding the person; because although

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you are satisfied that this club came from that cart sometime after the third of January, between the third of January and the fifteenth of February, anybody passing that way might have taken that club, and might have left it where the person who committed this offence found it. The person who took the stake from the cart would not necessarily be the one who committed the offence.

Then you take other circumstances. If you are satisfied, for instance, from the character of the money in the house, that the money scattered upon the ground was money stolen that night,—that is a matter of which you may or may not be satisfied by the inferences which you may draw from other corresponding facts, from the failure to account for it in any other way,—if you take that, then, as money that was stolen that night, and you take the mode in which it was distributed as indicating the direction in which the person who committed the offence that night went, then you see you have another circumstance which points in that direction, and you are to give it such weight as it has, not merely by itself, but in concurrence with the other facts which you have traced out.

And so the footprint. The footprint, you will perceive, by itself, is a footprint which might be made, perhaps, by many other shoes, no one knows how many. Standing by itself, it would have no especial force. You are only to consider it as one of those surrounding circumstances which may have more or less of force according as you find it tallies with other circumstances in one conclusion which may be arrived at.

So, in further illustration of this same idea I may make a few remarks upon the subject of the blood. The spots which were found upon the overcoat of the prisoner, the spots which were found upon his shirt collar, the spots which were found upon his hat, the spots which were found upon the pillow-case, or at least on a piece of cloth from a pillow-case from the house, the spots on the paper about the bed of Simeon Sturtevant, and various other spots, some of which were human blood and some of which were blood the character of which is to be ascertained, were examined. Now, the blood upon the garments of the prisoner is competent evidence upon the question whether he committed the offence. Even though it be not shown that it is anything more than blood, you are to consider it, because, if he has blood upon his clothing the second day after the murder, inferences may be drawn from it which will be stronger or weaker according to the character of the blood found upon him, its position, whether there is any way of explaining its existence there otherwise; and if you have merely the fact that it is blood, it leaves open a wide range of possibilities that are consistent with innocence. It may be the blood of a chicken, it may be the blood of a mammal, it may be the blood of a man. Now, then, if you proceed and can by any satisfactory means show that it is not the blood of a fowl

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or a fish, then you see you have narrowed the range of investigation, and you have given to it more importance, because it is open to fewer explanations of other sources from which it may come. So, if you can proceed further and show, from its correspondence, when restored, to the blood of human kind which has been dried and restored, that it is human blood, then the force of it, as a circumstance touching the defendant, is increased. Whether that can be done or not is a matter for your consideration, upon the evidence which has been presented to you. If it can be done and has been done, so that you are satisfied that it is human blood, then it is a circumstance of much more importance and significance than if it remained simply as blood; more, even, than if it remained as the blood of an animal. You are to take into consideration the evidence in regard to its being human blood, and give it weight just according to the degree of force which you may be willing to give it in your own minds as evidence tending to show that it is human blood. If it is not shown to your satisfaction to be human blood, and is shown to your satisfaction to be mammal blood, and not the blood of fowls or of fishes, then you will give it that consideration. If it is merely shown to be blood, and nothing more, you will give it such consideration, in that wider range of possibilities in accounting for it, as you think it is entitled to, merely as blood. In other words, the degree of force with which this should weigh, as circumstantial evidence, in connection with other evidence, depends upon the degree of certainty with which you can narrow down its character, or the strength of the probabilities which you can bring to bear upon the question of its character,—whether merely blood, the blood of a mammal or the blood of a human being. It does not prove, alone, the guilt of the defendant; but its main force depends upon the consideration whether it might reasonably be accounted for, if it be human blood, or if it be blood, upon other considerations, or whether it is accounted for by supposing that the prisoner committed this deed, and can be accounted for in no other way.

You will take all the evidence in connection with each one of these circumstances into consideration, bearing in mind that neither of the circumstances is necessarily proof of the guilt of the prisoner. Each one of the circumstances is competent for your consideration as a circumstance, the force of which will depend upon its agreement or coincidence with other circumstances pointing in one or the other direction.

So in regard to the possession of money. It is a general rule, that where property has been stolen, and it is afterwards found in the possession of a person who is not its rightful owner, that is evidence that he committed the theft. But you see it is not a necessary conclusion; it is only an inference which is drawn from the other facts. It is an inference drawn against him, because, if he were not the thief, he can generally tell

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where he got it. It is an inference stronger or weaker according to the length of time which has elapsed since the loss of the property, and the ease with which it might be transmitted from one to another without the capacity to recollect where it came from.

Now, money is not exactly like a horse, or a cow, or any other article of that sort which might be stolen and found in the possession of another person. The possession of money by the prisoner is a circumstance, and you are to treat it as you would any other circumstance. You are to treat it just as if this trial was for theft instead of for murder. So the circumstance of the money which he had is a circumstance to be taken with the other circumstances upon the question which you are to consider. And in that connection, it is important for you to inquire whether he was possessed of money the week before, or whether he was without funds. If he was without funds the week before, and the day after this murder; or the second day, was in possession of a large amount of funds, that circumstance, unexplained, if there was a loss of money at the house, is a strong circumstance tending to show his guilt. Then you will consider the character and satisfactoriness of the explanation which he may have given of the possession of money on Tuesday which he had not the week before, if you are satisfied that he did not have it the week before. In this connection, as bringing it more nearly to the case of the theft of a cow or a horse, you will have to consider any peculiarity this money had, and its correspondence with any money which was in the house of the Sturtevant's.

I need not go into these matters in detail. My purpose was not to touch upon the question of the force of them, but to call your attention to the relation which each circumstance has to the question you are investigating. If you are satisfied that this money which he had was of such a peculiar character that he would not be likely to be in possession of it, except from the theft in this house, then it is a strong circumstance. If, however, the money that he had was of the kind which was in general circulation at the time, then the peculiarity of the money ceases to have force. If you are satisfied that he had no money the week before, and had a large amount on Tuesday, then, unless he gives some account of the sudden acquisition, it is a strong circumstance which you may consider. If, in attempting to account for the possession of the money, whether as to its amount or its peculiarity, he has given unreasonable accounts, false accounts, accounts which were not satisfactory and are not probable, you may take that into consideration; because an innocent man ordinarily has no occasion to give a wrong account of what is in his possession.

But in this connection, you must take into consideration the fact, that a man who is apprehensive of a charge of crime is not always gifted with that clear presence of mind and courage which enables him

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to tell stories which are thoroughly consistent with the truth and with his innocence. You are to take into consideration how far he may have been influenced by any fear of this sort. You are also to take into consideration the suggestions which have been made arising from the fact, that there were other suspicions against him as to money, and see whether, taking all these suggestions into consideration, they account for any discrepancies in his statements with the truth, as you are satisfied the truth is, or for any improbable explanations.

The evidence as to the loss of money by Mr. White was excluded, because there seemed to be no evidence, and no proffer of evidence, to connect the prisoner with the loss particularly, except his own statements, which are not competent for the purpose — I mean his own statements elsewhere. The loss of money by Mr. White, in the opinion of the court, did not tend to account for the possession of money in his hands, any more than the loss of money by any one in the neighborhood. There has been money enough lost, every one knows, in the community, in years past, to account for any amount of money, in the possession of any one. Therefore that evidence was not admitted to account for the money found in his possession. But the prisoner has a right to the benefit of the suggestion that he might, either by honest or dishonest means, have acquired this money elsewhere. You are to take into consideration all the suggestions that have been made about his acquiring means in an honest manner; you are to take into consideration the suggestions that have been thrown out that he had acquired some in a dishonest manner, other than this: and if these explain any of the discrepancies of his statements to the officers as to this money, he is entitled to the benefit of the suggestion, because he is entitled to whatever raises a doubt in your minds.

The confessions of the prisoner, obtained in the mode these were obtained, the court thought were competent to be admitted here against him; but it is due to him to say, that confessions by one under arrest, or one charged with an offence, or one who is subjected to scrutiny and surveillance, are always to be scrutinized carefully, lest he may be misunderstood in his statements, or the interrogator, from zeal, or preoccupation of mind as to the bearing of those statements, may either understand them incorrectly, or report them incorrectly. Here they are competent evidence, and you are to consider them under all the circumstances in which they were made, and see how far they tend to show guilt, and how far they are to be explained by anything in the circumstances of the prisoner when he made them, which weakens or strengthens their force.

The omission of the prisoner, as I have already suggested, to explain any facts which bear upon him personally, may be taken into consideration just so far as you think it is reasonable to expect that he would have

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explained them if he were innocent. It is often beyond the power of a man to explain a fact which bears against him. The mere omission to explain a fact which bears against him is not of itself evidence against him, because the burden is all the time upon the government to furnish you the evidence upon which to convict him, beyond a reasonable doubt. But when a fact which bears upon him personally is brought to his attention, and it is such a fact as you think he may reasonably be expected to explain, and would explain if he were innocent; that is, if it may reasonably be supposed that the explanation would be within his power, and he fails to produce it; then that is to be taken into consideration, and to bear against him just so far as you think that failure is inconsistent with innocence and indicative of guilt. And that consideration you are to apply to his omission to produce his wife as a witness. If you think that, if he had been innocent, she would have been able to prove his innocence, then the non-production of his wife is ground of inference that her production would not establish any fact favorable to him. You have heard the suggestions of his counsel, and it is right for you to take into consideration all reasonable suggestions as to the reason of her absence. Of course, it would be a severe trial for her to come here on such an occasion as this, and if her evidence would have been merely negative, even though, so far as it went, it would be consistent with his innocence, the prisoner might well forbear to produce it. But you will consider upon all the circumstances how far his omission to produce her shows that her production here would not aid him, and, if it would not aid him, how far it is a ground for any inference to the contrary. As I said, you must take into consideration all the suggestions which are made in regard to her absence, and if suggestions have not been made, you will take into consideration those which occur to your own minds, including, also, the position in which both the prisoner and his wife are placed.

I have gone over the evidence, not to collate it, not to show how strongly it may bear, not to connect it, but to show in what respect it is to be taken by you as bearing directly, and in what respect it only establishes some collateral fact. You have heard the arguments of counsel on both sides as to its force, as to its connection, as to the truth of the evidence by which the guilt of the prisoner is sought to be established, and you will give to the arguments, and to the evidence as you heard it, such consideration as you think is due to them, with the aid of the suggestions, as to the bearing of the legal presumptions, which I have suggested.

All the circumstances which have been called to your attention are to be treated in their relation to each other, and you are to see, not whether each one may be explained away, not whether each one shows guilt, but whether all together point in such a direction as to indicate one

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result only, and that result the guilt of the prisoner. If it does so beyond a reasonable doubt, to your minds, then it is your duty to find him guilty. If it fails to do so, if it points elsewhere, or if all which points towards him is not enough to remove from your minds serious doubts, all reasonable doubts, as to his being the person who committed the offence, then it is your duty to say that he is not guilty, because he is not guilty unless the government, by the evidence which they have produced here before you, have sustained the burden upon them, which is to satisfy your minds, beyond a reasonable doubt, that this defendant committed this offence of robbing this house and murdering Simeon Startevant. If you are satisfied, from all the evidence, that he, and no one else, committed this offence, or that he committed it with some one else, — for it is immaterial whether he committed it alone or with some one else, if he was engaged in it, — if you are satisfied, beyond a reasonable doubt, that all the evidence points to him, that there is no reason to suppose that there is any one else to whom the evidence would apply, then the government have sustained that burden, and your duty is fulfilled by simply declaring him guilty. If they have failed to sustain that burden in all respects, so as to remove from your minds all reasonable doubt, then it is your duty to find him not guilty. If, as I before said, you find him guilty of murder, you will indicate, in your verdict, whether it is murder in the first degree or in the second degree.

Mr. Harris: I desire your honor to qualify one remark which was made in the charge, which was this: That if the evidence points to the prisoner in such a manner that it seems to require of him an explanation, and he has not made it, then the jury may draw certain conclusions. What I desire is, that your honor will say to the jury that in that remark you did not intend to imply that it devolved upon the prisoner, upon the stand, to explain it.

Wells, J.: Thank you. I intended to say so, and I should say so, because the statute expressly requires it. In all these suggestions as to his failure to explain, you must carefully exclude all suggestions that would require him to go upon the stand; because, although he may go upon the stand, it is a privilege which a prisoner rarely takes, and which, under the advice of counsel, he may decline to take, without any inference against him on account of his not going upon the stand. Therefore, when I said that if any fact against him is brought to your attention which you think he might explain if he were innocent, and can reasonably be expected to explain, and he does not explain it, you may draw the inference that the fact exists unfavorably to him, I intended that you should exclude, in considering whether it is reasonable to expect him to explain it, any idea of his explaining it by his own personal testimony. If there are any facts which tell against him, and which can



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only be explained by himself,—that is, which no one else could be brought to explain, or which he by his knowledge could not, unless he went upon the stand, explain,—you will not draw any inference against him because he does not go upon the stand himself. But so far as he had attempted to explain any facts brought against him, you will consider how far the explanation is satisfactory; and if he has failed to give a satisfactory explanation, or given a false explanation, then you will consider that. You will be careful to exclude any inference against him, because he does not explain by going upon the stand here in the trial.

The jury, after an absence of two hours, found a verdict of guilty of murder in the first degree, upon which sentence of death was subsequently imposed. He was executed May 7, 1875.

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#### No. VII.

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#### COMMONWEALTH v. POMEROY.

*Supreme Court of Massachusetts, November, 1874.*

[Before GRAY, C. J., and MORTON, J.]

THE defendant, Jesse H. Pomeroy, aged fourteen years and five months at the time of the homicide in question, was charged with the murder of a boy of four years, named Millen, under circumstances indicating peculiar cunning as well as cruelty. The evidence pointing to the defendant as the guilty party was so strong and was so fully corroborated by the defendant's confessions, that the facts were not contested by the defence, and the plea of insanity was set up. His mother testified that he had been more than once sick within the prior few years, and when sick had been delirious; that he was sometimes in a dreamy state, mistaking the dream for reality, and that he was subject to headaches. Other witnesses deposed to acts of eccentricity. Several boys between eight and eleven years of age, proved that he had taken them individually into secluded places, and there beaten them, sometimes with much cruelty; and a confession of another homicide by him under circumstances of similar cruelty was produced. Two experts, Dr. Tyler and Dr. Walker, were examined on part of the defendant, whom they had visited in prison, and testified that they considered him mentally diseased. Dr. Choate, who had also visited him, was examined by the commonwealth, and came to a contrary conclusion, holding that neither the defendant himself exhibited insanity, nor was insanity to be inferred from the evidence. The defendant was convicted of murder in the first

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degree under the charge of the court, and on February 20, 1875, was sentenced to be hung.

It is proper to state that the following report is taken from the stenographic notes of the trial, for which the editor is indebted to Mr. Train, the attorney general of the commonwealth.

In the course of the trial, the following discussion took place as to the degree of proof necessary to sustain the defence of insanity: —

Mr. Train: On the question of the capacity of the defendant, and of his sanity or insanity, I understand that question is to be settled by a preponderance of evidence.

Gray, C. J.: That the government sustains it by preponderance of evidence?

Mr. Train: I mean that the jury are to decide as the evidence in their mind preponderates, but the government are not bound to satisfy the jury beyond a reasonable doubt; that when the question of sanity is raised by the defendants, that question is to be determined by preponderance of proof.

The Court: The understanding of the court is not in form exactly that. The burden is upon the government to prove everything essential beyond reasonable doubt; and that burden, so far as the matter of insanity is concerned, is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind and understands the nature of his acts. But when the circumstances are all in, on the one side and the other; on the one side going to show a want of adequate capacity, on the other side going to show usual intelligence; when the whole is in, the burden rests where it was in the beginning, — upon the government to prove the case beyond a reasonable doubt.

The following passages are extracted from the stenographic report of Chief Justice Gray's charge: —

New, murder in the first degree may consist and be proved in either of two ways. Murder with deliberately premeditated malice aforethought is murder in the first degree. Every murder is committed with malice, and it is unnecessary to enter into any definition of malice in this case, for if the act was committed by the defendant and he was accountable (of which I shall have something to say hereafter), the wilful killing of another person, without excuse, shows evil intent enough to prove malice without any nice definition upon that subject. But in order to be murder in the first degree, within this branch of the statute, the act must be committed with "deliberately premeditated malice aforethought." If you hear that phrase now for the first time, perhaps it seems to be a heaping up of words having no meaning; but if you stop and think of it, you will see that the words "deliberately premeditated malice aforethought" mean simply — thought upon, resolved, upon beforehand; not

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done suddenly, not a thing that comes into the mind in a moment, and is done before there is time to think about it, but a thing either thought of or planned some time before, or, if not planned long before, thought upon long enough before the act is done, or the blow struck, so that it can be said, reasonably, to have been purposed. No length of time is necessary. Sometimes long preparation is made, sometimes a firm determination is made, completed, and acted upon very shortly. The law does not prescribe any limit of time; does not attempt to define the quickness with which the human mind can act. If it is thought upon reasonably beforehand, that is sufficient to make it murder in the first degree. Therefore, if you find that to be the fact in this case, if you find the homicide was committed by this defendant, and that he is an accountable person, you will be authorized to find a verdict of guilty of murder in the first degree. But in addition to that, there is another class of murder which the statute has separated from the general class, and has said shall be murder in the first degree, and that is, "murder committed with circumstances of extreme atrocity and cruelty." These are words to which the law affixes no peculiar definition. It attaches to them no meaning different from that which they have in the minds and speech of all men. You know, just as well as any lawyer or court does, what are "circumstances of extreme atrocity and cruelty." It is for you to judge, if you believe that this little boy was killed by the defendant by the wounds that you have heard described by the witnesses, — the cut in his throat, the stabs on his breast, the cuts in other parts of his body, and all the circumstances attending it, — whether or not the murder was committed with "circumstances of extreme atrocity and cruelty." If you are satisfied that it was, it will be your duty to find him guilty of murder in the first degree, — that is, if he was an accountable person.

In every case where a person is charged with murder in the first degree, that is, murder committed with deliberately premeditated malice aforethought, — you will take into consideration the condition of the accused person, and whether he had that degree of mind, and was in that state of mind, at the time, that he was capable of exercising deliberate premeditation. I may as well say a word to you here upon the age of the defendant. A boy over fourteen years of age, if he is of the ordinary capacity of boys of that age, and of sound mind, is responsible for his acts, to the same degree as an adult person. The question of what mercy should be extended to him, in consideration of his youth, by the pardoning power, is a question for the governor and council, and not for us. So far as the law lays down the rule, if a boy is fourteen years of age, and of the usual intelligence of boys of that age, and his mind is not affected by insanity or congenital weakness of any kind, which

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should make him incapable of premeditating and resolving and acting, he is just as responsible as a person of full age.

Now we come to what has really been made the principal issue in this case, and is the principal issue in this case. Was the defendant, at the time of committing this offence, of sufficient mental capacity to be held criminally responsible for his acts? As you perhaps understand from what has taken place in your presence, the government comes before you saying that the defendant has committed the crime of murder in the first degree. The government coming here and alleging that is bound to prove it. The defendant pleads "not guilty," and leaves the government to prove it. The government is bound to prove, therefore, that the defendant has committed the crime charged against him, and is bound to prove it, according to the usual phrase, "beyond a reasonable doubt." That does not mean beyond every possible doubt, beyond anything that the imagination of man can conjure up; for the law recognizes that all human tribunals, and all human judgments, are fallible. Human tribunals can only come to the best results their powers enable them to reach. The jury should be satisfied beyond a reasonable doubt that the defendant committed the crime, and committed it in that degree in which they find their verdict. Of course, if you find the defendant guilty of an aggravated and atrocious crime, he must have been in such a state of mind, at the time of the commission of the crime, as to be responsible for the act. The law does not punish insane persons as criminals; nor on the other hand, does the law say criminals are to be excused on the theory that they are insane persons, unless they really are so.

Now, the burden of proof being on the government to prove that the defendant committed the act, and that he was a capable person at the time he committed it, the presumption of the law, as well as of common sense, is, that persons, either of full age, or above the age of fourteen, are ordinarily sane; and that presumption is of itself, so far as the question of soundness or unsoundness is concerned, sufficient, if nothing else is shown, to support the burden resting upon the government. If a homicide is committed, the presumption is, in the absence of proof to the contrary, that the person committing it was of sound mind. But where, as in this case, there comes in evidence, on the one side and the other — evidence of circumstances, evidence of opinion — bearing upon that question, offered for the purpose of showing, on the one side, unsoundness of mind, and, on the other, for the purpose of confirming the presumption of soundness, it will be for you, taking the whole case together, to say whether you are satisfied that the government has proved the whole case; whether, taking the general presumption of sanity into consideration, as well as all the facts, the case is made out.

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The question of sanity or insanity is a question of fact. "Was the defendant of sound mind?" is a question which is submitted by the law to the jury to try. In order to assist you in trying that question you have different kinds of evidence. In the first place, you have often, as you have had in this case, the testimony of eye-witnesses, extending, in this case, over a considerable period of this boy's life, especially for the time just before he went to the Reform School, and during his sojourn in the Reform School, as to his conduct during that period, and you have also had evidence as to his acts and conduct at the time of the commission of this homicide, and as to his acts and conduct afterwards, to enable you to judge whether he was a sane or insane person. Then, as insanity is sometimes a subtle disease, the symptoms and effects of which are difficult for persons not skilled in such matters to understand, the law allows you to hear the opinions of professional and medical experts upon that subject. The opinions of professional experts are of various classes and degrees of importance. As, for instance, if you have the opinions of experts who had an opportunity to examine the person at the very time he committed the act, those opinions, of course, are of greater weight, because there is less mistake, usually, about the facts and observations to which the experts testify, than where opinions are given from an examination of the person some weeks or months after the time, which is the time in question before you, and where they are giving opinions upon hypothetical questions merely, and upon testimony in regard to acts which the experts themselves did not see. It is observed, on the one side, that the testimony of experts is sometimes very valuable, by reason of their skill and science enabling them to observe circumstances and symptoms which an ordinary observer would not notice; and, on the other side, it is sometimes observed that medical experts, from their habit of dealing with a particular class of facts (as is shown with scientific men in other departments), get into the way of looking too much for evidence to support their own theories, and observe minute details, and make minute investigations, which are found to be of little practical use. It is always for the jury, in each case, after having heard the testimony of the actual facts, as observed by eye-witnesses, and after having heard the testimony of experts, as to their opinions, on the one side and the other, to decide the question.

So, gentlemen, in this case, it is for you, as sensible men, taking the opinions and suggestions of the experts, taking the facts as they have been described to you, taking such inferences as are reasonably, according to the common experience of mankind, to be drawn from the facts which have been brought to your attention, on the one side and the other, by the counsel, to say whether this defendant was of sound or unsound mind. That is to say, was he of sound or unsound mind, so far as this

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particular case is concerned? What you are dealing with here is the question of soundness or unsoundness, as affecting the defendant's responsibility for the homicide of this little boy, not whether he might or might not be responsible in any other respect.

Now, upon that I cannot do better, in the first place, than to read to you one or two passages from the charge of Chief Justice Shaw, in the trial of Rogers, which has been alluded to in the course of the trial, and perhaps these same passages may have been called to your attention :—

“ In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose ; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his mental power is, for the time, obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.”

“ If it is proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience, and judgment, or whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse.” 7 Metc. p. 501, 502.

The question then before the court was one of delusion. There is no suggestion made here, on the part of the defendant, as the court understand it, that there was anything of the nature of a delusion, but it is said that the defendant was under an irresistible impulse. The defence, as we understand it, is based upon this position : that the prisoner was capable of understanding the difference between right and wrong ; that he knew that his acts were wrong at the time when he did them, but that, to use his own expression, he had to do these things, — he could not help it ; there was something, there was an overpowering insane impulse that drove him to do these things. Now, on the question whether that is so, without recapitulating the circumstances attending his conduct with regard to this boy, or with regard to the lesser outrages committed on other boys, you will remember the testimony as to the mode he took to lead children away ; as to the nature of the places to which he took them ; the circumstances attending the inflicting of cruelties upon them, and what he did at concealment ; how far he seemed to be cognizant of the nature of the acts he had done, and all the other circumstances of the case on that subject. And with that you will also take the testimony of the experts, so that with the facts and with the testimony you will judge whether he was of sound mind, understood the criminal nature of the act he was doing, and was capable of doing it or not doing it. All the evidence that has been put in is to be considered by you on the question

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of fact, whether he was sane or insane. On the question whether a person can be in such a state of mind that he knows the difference between right and wrong, and yet be under such an uncontrollable insane impulse that he cannot resist doing the wrong, we have difficulty in saying to you, as matter of law, that that is or is not so, because, evidently, if it does exist, it is a disease of the mind ; and on the question of whether there is such a disease of the mind, you are to hear the testimony of experts skilled in that branch of science, whether, in the first place, there is such a general disease of the mind, and then, particularly, whether this act comes within it. The testimony of Dr. Tyler and Dr. Walker goes to show that, in their view, a man may be, in certain cases, capable of distinguishing the difference between right and wrong, and yet may be so insane, and under the control of such an overpowering impulse, that he cannot do the right, though he knows what is right ; and they say to you that they are of the opinion, under all the circumstances of this case, judging from what they saw afterwards, and from the testimony at the trial, that the defendant was insane at the time of committing the act. On the other hand, Dr. Choate, if we understand his testimony, says that an irresistible impulse to commit an act, so as to constitute insanity, can hardly be proved merely by the want of apparent motive ; that you must have something more, — such as acts showing insanity, something in the nature of the acts themselves, tending to show insanity, or something like insanity in the blood, showing that it has come out in the family before, or some disease, or some physical change in the appearance of the person, going to corroborate it. He expresses the opinion, on what he has observed, that this person was not insane. Although we cannot say to you that there cannot be such an insanity, if you think that it is fairly proved by the testimony of the experts, as that a man may know the difference between the right and the wrong, and still may have an overmastering, overpowering insane impulse, that obliges him to do the wrong, still we feel bound to say to you that the argument or assertion, “ I had to do it,” is a very old defence of wrong-doers. “ The serpent beguiled me and I did eat ” was the earliest excuse, and it has always been said since, “ The devil tempted me.” That was a phrase often used when references to supernatural powers were more common in ordinary speech than they are to-day. In the old indictments which some of you may have happened to see, the form used to be, that the defendant, “ not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, did ” so-and-so ; but it was not thought that his “ being moved and seduced by the instigation of the devil ” made an overpowering insane impulse, that prevented him from being held accountable in human courts for his crime. But after all, gentlemen, the whole matter is for you to decide. After hav-

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ing heard the evidence on the subject, and having heard the opinions of the experts, giving them such weight as you consider them entitled to, do you believe that this boy, understanding the nature of the acts he was doing, so far as to know that they were wrong, and having the mental power to do them or not to do them, did them? If, having the mental power to do them or not to do them, and understanding they were wrong, he did them, then he is accountable. If you are not satisfied that he had that mental power, then he is not.

The only thing that occurs to me further as necessary to say, before submitting the case to you, is as to the form of the verdict. If you are satisfied that the defendant, being of sufficiently sound mind to be accountable for his acts, and by reason of deliberate premeditation, or by reason of the circumstances attending the crime being extremely atrocious and cruel, was guilty of murder in the first degree, it will be your duty to find him guilty of murder in the first degree. If you should not be satisfied of that, but still be satisfied that he was accountable when he committed the act, then you will find him guilty of murder in the second degree. If you should find that he committed the act, but think he was insane at the time, then it will be your duty, if you fail to find him sane, to find him not guilty, by reason of insanity.

As the matter has been alluded to at different times during the trial, and as it is always better for the jury to understand what different consequences are to follow from their verdict, as it may be in one form or another, I will state them. If your verdict is "Guilty of murder in the first degree," the punishment awarded by the court is death; but that sentence can only be carried out at the pleasure of the governor; it is liable to be set aside or commuted by the governor. If you find him "Guilty of murder in the second degree," the sentence of the court will be imprisonment for life, subject, of course, to pardon or commutation by the governor and council. If you find him "Not guilty by reason of insanity," he is to be sent by the court to a lunatic hospital, there to remain unless he is released by the governor and council. We only allude to this in order that we may keep nothing back from you as to the surroundings of this case, and not, as we have already said, because it can have any bearing whatever upon what you shall decide, because it is your duty to decide without regard to the consequences that may follow upon your decision. If you are satisfied, according to the rules of law that have been laid down to you, that this boy, being an accountable person for his acts, committed the crime of murder in the first degree, it is your duty to find so upon your oaths. If you are not satisfied that he is guilty of murder in the first degree, but still consider him sane when he committed the homicide, it will be your duty to find him guilty of murder in the second degree. If you are not satisfied that he was of sound mind



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it will be your duty to bring in a verdict of not guilty by reason of insanity.

Of course, gentlemen, it is within your province to acquit him altogether, but that is not pressed by his counsel ; and as there seems to be no aspect of the case in which that can be presented, we say nothing further to you upon the subject.



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See Sec 606 - I contend that the rule here laid down extends to, and is applicable where the defense of justifiable Homicide based upon the killing of one who is attempting to commit a felony by one who attempts to prevent the commission of the crime is inapplicable.

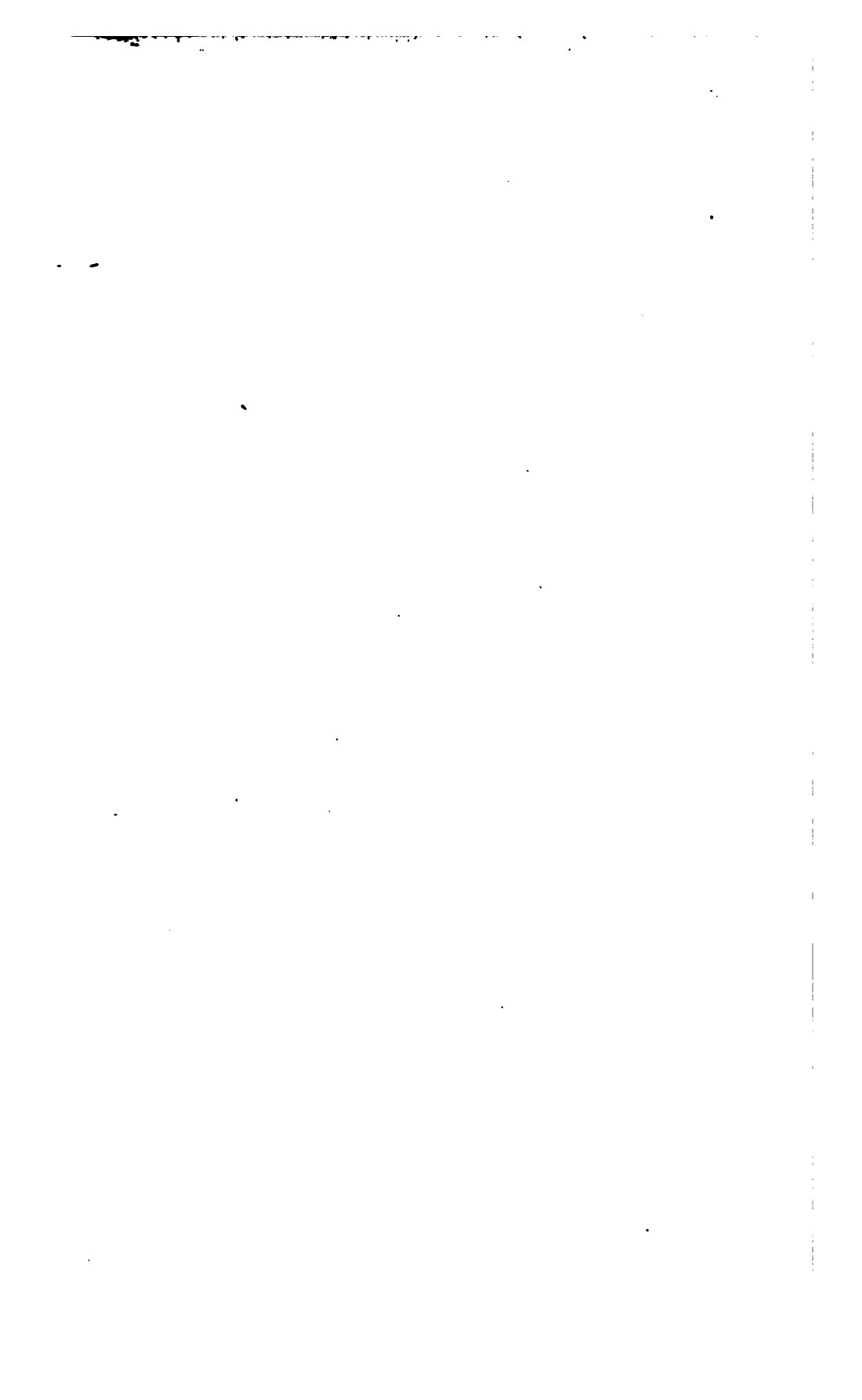
Reason supports the doctrine that it is under such circumstances equally competent - as reflecting upon the bona fides of defendant acts

Comment.

The old English ~~law~~ requiring a retreat to the wall before resorting to deadly weapons & the taking of life as means of self preservation was not more absurd, nor was it half so vicious in its application as the present law rules which practically make any verbal menace, threat, or equivocal act the pretext of taking life under color of self defense by an angry and excited man who is exempted from all (practically all) responsibility in the exercise of his judgment as to apparance of danger.

It too often happens that the victim is goaded into such rage that may be construed as menacing by a wary opponent who avails himself of the favorable opportunity presented to satisfy his malevolent rage in perfect safety so far as human law is concerned —

Motive - Crime is never logical  
least of all where the law is not  
enforced nor made terrible  
Sec 670















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